# Supreme Court of the United States

OCTOBER TERM, 1969

**No. 179**

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WILLIAM P. ROGERS, SECRETARY OF STATE OF THE UNITED STATES OF AMERICA,
*Appellant,*

—v.—

ALDO MARIO BELLEI,
*Appellee.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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## INDEX TO APPENDIX

# DISTRICT COURT

## Chronological List of Important Proceedings and Dates

| Date | | Proceedings |
|---|---|---|
| 3-24-67 | ( 1) | Complaint filed in U. S. District Court for the Southern District of New York |
| 8- 9-67 | ( 2) | Plaintiff's motion for a three-judge court, affidavit and memorandum of law in support of motion filed |
| 10- 2-67 | ( 3) | Affidavit in opposition to plaintiff's motion to convene three-judge court and memorandum of law in opposition filed |
| 10- 3-67 | ( 4) | Reply affidavit in support of motion for a three-judge court and memoranda of law in support thereof filed |
| 11- 2-67 | ( 5) | Opinion of Court filed |
| 11-16-67 | ( 6) | Order of Court filed denying motion to convene three-judge court, without prejudice, and transferring case to United States District Court for the District of Columbia |
| 1- 8-68 | ( 7) | Plaintiff's motion for a three-judge court, affidavit and memorandum of law in support thereof filed |
| 3-21-68 | ( 8) | Defendant's response to plaintiff's motion for three-judge court filed |
| 3-26-68 | ( 9) | Plaintiff's motion for summary judgment and memorandum of law in support thereof filed |
| 3-28-68 | (10) | Stipulation of facts filed |
| 4- 3-68 | (11) | Defendant's motion for summary judgment and memorandum in support thereof filed |
| 4- 8-68 | (12) | Request for designation of three-judge court filed |

| Date | | Proceedings |
|---|---|---|
| 4- 8-68 | (13) | Designation of judges to serve |
| 4-17-68 | (14) | Plaintiff's reply memorandum in support of his motion for summary judgment filed |
| 4-23-68 | (15) | Defendant's reply brief filed |
| 2-28-69 | (16) | Memorandum opinion and concurring opinion filed |
| 5-22-69 | (17) | Judgment filed |
| 5-23-69 | (18) | Notice of Appeal filed |
| 5-23-69 | (19) | Order directing transmittal of all original papers to Clerk, U. S. Supreme Court filed |

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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67 Civil 1166

ALDO MARIO BELLEI, PLAINTIFF

*—against—*

DEAN RUSK, Secretary of State
of the United States of America, DEFENDANT

## COMPLAINT FOR INJUNCTION, DECLARATORY JUDGMENT, AND OTHER RELIEF

Plaintiff, by his lawyers O. John Rogge, Henry Mark Holzer, and Phyllis Tate Holzer, complaining of defendant, allege that:

1. Jurisdiction of this Court exists because of diversity of citizenship, because the question involved here arises under the Constitution and laws of the United States, and because the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs.

2. Jurisdiction of this Court also exists under Section 360(a) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1503(a), (hereinafter referred to as the "Act").

3. Jurisdiction of this Court also exists under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, as implemented by the Declaratory Judgment Act, 28 U.S.C. § 2201.

4. Defendant is Secretary of State of the United States of America, having been duly nominated, confirmed, and sworn into said position.

5. At the time of plaintiff's birth, outside the geographical limits of the United States and its outlying possessions, his father was an alien.

6. However, his mother was a citizen of the United States who, prior to plaintiff's birth, was physically present in the United States for a period or periods totaling

not less than ten years, at least five of which years were after attaining the age of fourteen years.

7. Thus under the Act, plaintiff was a native United States citizen.

8. At no time prior to February 12, 1964 had plaintiff been continuously physically present in the United States for at least five years.

9. On or about February 12, 1964 the Department of State held that plaintiff's native American citizenship had been revoked because, as required by Section 301(b) of the Act, he had never been continuously physically present in the United States for at least five years.

10. Upon information and belief defendant authorized, ordered, and ratified the revocation of plaintiff's citizenship.

11. As a result, plaintiff has suffered and will continue to suffer irreparable injury, including but not limited to being denied the precious right of being an American, the ability to possess and travel on an American passport, and to enjoy American diplomatic protection.

12. Defendant's action of purportedly revoking plaintiff's native citizenship was based on Section 301(b) of the Act.

13. Section 301(b), and the alleged revocation of plaintiff's native citizenship, unconstitutionally violates:

(a) the Due Process clause of the Fifth Amendment,

(b) the Cruel and Unusual Punishment clause of the Eighth Amendment,

(c) the Ninth Amendment.

WHEREFORE, plaintiff requests that:

(a) a three-judge court be convened in accordance with 28 U.S.C. §§ 2282, 2284,

(b) that said court permanently enjoin defendant and his successors and subordinates from carrying out or otherwise enforcing Section 301(b) of the Act,

(c) that said court render a declaratory judgment that section 301(b) of the Act is unconstitutional,

(d) that said court render a declaratory judgment that plaintiff is still, and has never ceased being, a native American citizen,

(e) that said court grant such other and further relief as may be just, including but not limited to expunging all records wherein it is indicated that plaintiff's citizenship had been revoked.

/s/ O. John Rogge
O. JOHN ROGGE
HENRY MARK HOLZER
PHYLLIS TATE HOLZER
Lawyers for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

STIPULATION OF FACTS

1. Plaintiff was born at Ancona, Italy on December 22, 1939. His father, Crescenzio Bellei, was then and always has been a citizen of Italy and was never a citizen of the United States. His mother, Theresa Lola Bellei, nee Cesaretti, was born in Philadelphia, Pennsylvania on March 14, 1915 and resided in the United States until March 23, 1939. When she was 24 years old, she went to Italy to live with her husband, whom she had married in Philadelphia, Pennsylvania on March 14, 1939. At the time of plaintiff's birth his mother was, and always has been, a citizen of the United States.

2. Plaintiff acquired Italian citizenship at the time of his birth in Italy and has retained his Italian citizenship since then. He also acquired United States citizenship at the time of his birth, under the terms of Section 1993 of the Revised Statutes, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797.

3. Plaintiff has resided in Italy from the time of his birth until recently, except that he was physically present

in the United States from April 27, 1948 to July 31, 1948, from July 10, 1951 to October 5, 1951, from June of 1955 until October of 1955, from December 18, 1962 to February 13, 1963, and from May 26, 1965 to June 13, 1965. On the first two such occasions, plaintiff came to the United States on his mother's passport. She was in possession of a United States passport, and was admitted to the United States with her children as citizens of this country. On the next two such occasions, he came to the United States on his own United States passport, and was admitted to the United States as a citizen of this country.

4. Plaintiff was first issued his own United States passport on June 27, 1952. Thereafter, his passport was periodically renewed up to and including December 22, 1962, his twenty-third birthday. His application for a passport approved on August 1, 1961 contains the following notation "Warned abt. 301(b)".

5. On January 14, 1963, while he was in the United States, plaintiff applied for another passport, stating in his application that he resided in Havertown, Pennsylvania, that he was a student, that he intended to depart from the United States in February 1963 and to remain abroad 3 months, and that he was going to Italy to complete his studies. The application was granted, but the validity of his passport was limited to July 21, 1963. At the time of the issuance of this passport the Department of State sent plaintiff a letter dated January 22, 1963, copy of which is annexed and incorporated herein as Exhibit "1".

6. On July 18, 1963, plaintiff applied in Rome, Italy for an extension of his passport, alleging that he intended to return to the United States to reside permanently within 7 months. In specifying the purpose of the requested extension the application stated: "I have resided since my birth in Italy to reside with my parents and for studies. I last left for the U.S. on Dec. 18, 1962 and have returned to Italy on Feb. 13, 1963 to complete my studies." On November 20, 1963 plaintiff was notified that his passport was extended until February 11, 1964, but that if he remained in Italy beyond February 11,

1964 he would lose his United States citizenship under Section 301(b) of the Immigration and Nationality Act. Copies of that communication and its translation are annexed and incorporated herein as Exhibit "2".

7. Following plaintiff's failure to return to the United States prior to February 11, 1964 the Department of State concluded that he had lost his United States citizenship under Section 301(b) of the Immigration and Nationality Act, as amended, and he was orally informed of this conclusion by the American Embassy at Rome, Italy.

8. Thereafter plaintiff made a number of inquiries at the United States Consulate in Rome concerning the revocation of his passport. The United States Consulate in Rome advised him that his passport had been revoked, and that there was no way in which he could have it reinstated; but that he could obtain an Immigration Visa for himself and his wife under an immigration quota reserved to married sons and daughters of United States citizens. Accordingly, plaintiff applied for admission to the United States as an alien on May 18, 1965. He was admitted at that time as an alien visitor for pleasure authorized to remain until August 30, 1965. Thus he came to the United States on May 26, 1965 with an Italian Passport. He came with his bride to visit his grandparents on his mother's side. He departed with his bride from the United States to Canada on June 13, 1965.

9. In 1966 plaintiff again applied to the American Consul at Rome, Italy for an American passport. He was notified on November 29, 1966 that his application for a passport was denied on the ground that he had lost his United States citizenship under Section 301(b) of the Immigration and Nationality Act, as amended. Copy of that notification is attached and incorporated herein as Exhibit "3".

10. Plaintiff is currently employed by Nadgeco Ltd., Nadgeco House, The Center, Feltham, United Kingdom, as an electronics engineer. Nadgeco Ltd. is an organization engaged in the NATO defense program.

11. Plaintiff currently resides with his wife at 22 Mulberry Trees, Russell Road, Shepperton, Middlesex, United Kingdom.

12. On March 28, 1960 plaintiff registered under the Selective Service laws of the United States with the American Consul in Rome, Italy. He was asked to report for physical examination and passed such examination by the U.S. Army at Leghorn, Italy. On December 11, 1963 he was asked to report for induction at Washington, D.C., but his induction was deferred because he was employed on a NATO defense program. At that time he was again warned of the danger of losing his United States citizenship if he did not comply with the requirement of establishing residence in the United States. After February 14, 1964 he received a letter from the United States Selective Service explaining that due to loss of his United States Citizenship he had no further obligations for military service on behalf of the United States.

Dated: March 7, 1968.

/s/ O. John Rogge
O. JOHN ROGGE
FREEDMAN, LEVY, KROLL & SIMONDS
Attorneys for Plaintiff

/s/ David G. Bress
DAVID G. BRESS
United States Attorney

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States Attorney

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney
Attorneys for Defendant

Of Counsel:

/s/ Charles Gordon
CHARLES GORDON
General Counsel
Immigration and Naturalization Service

EXHIBIT 1

DEPARTMENT OF STATE
WASHINGTON

[Emblem]

January 22, 1963

In reply refer to
PASSPORT OFFICE

PT/DA-130-Bellei, Aldo Mario

Mr. Aldo Mario Bellei
c/o Mannella
545 Harrington Road
Havertown, Pennsylvania

In the interest of protecting your United States citizenship the validity of your passport has been limited.

Your attention is called to the enclosed pamphlet concerning the acquisition and retention of citizenship, particularly subsections (b) and (c) of Section 301 of the Immigration and Nationality Act of 1952, and also Section 16 of the Act of September 11, 1957 which is set forth at the bottom of page two.

/s/ Frances Knight
FRANCES G. KNIGHT
Director, Passport Office

Enclosure:

Pamphlet
Passports (2)

EXHIBIT 2

Ambasciata Americana,
Sezione Consolare,
Roma, 20 novembre 1963.

Signor Aldo M. Bellei,
Via Ugo Balzani 8,
Roma.

La competente autorita' degli Stati Uniti ha autorizzato questa Ambasciata ad estendere il Suo passaporto sino all'11 febbraio 1964, data in cui dovra' trovarsi negli Stati Uniti per rimanervi ininterrottamente sino al 18 dicembre 1967.

Rimanendo in Italia oltre l'11 febbraio 1964, perdera' ogni diritto alla cittadinanza ai sensi della Sezione 301 (b) della Legge Americana sulla Nazionalita' ed Immigrazione del 1952.

Distinti saluti.

Firmato: EVERETT L. DAMRON
Console americano

EXHIBIT 2

TRANSLATION

Mr. Aldo M. Bellei,
Via Ugo Balzani 8,
Rome.

Competent United States authorities have authorized this office to extend your passport until Feb. 11, 1964. You should be residing in the United States on that date and remain there continuously until December 18, 1967.

If you remain in Italy beyond February 11, 1964, you will lose United States citizenship under Sec. 301(b) of the Immigration and Nationality Act.

Signed: EVERETT L. DAMRON
American Consul

rrl

EXHIBIT 3

November 29, 1966

Mr. Aldo Maria Bellei
Via U. Balzani No. 8
Rome, Italy

Dear Mr. Bellei:

In reply to your verbal request for the issuance of an American passport in your name, your request is hereby denied since you no longer hold American nationality. This action is based on an instruction from the Department of State to this Embassy on on September 1, 1964 in which the Department held that you had lost American nationality as of February 12, 1964 by your failure to be physically present in the United States for a period of five years between your fourteenth and twentythird birthdays, as required by Section 301(b) of the Immigration and Nationality Act as amended by Section 16 of the Act approved on September 11, 1957.

Sincerely yours,

/s/ Everett L. Damron
EVERETT L. DAMRON
American Consul

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

[Title Omitted]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Upon the complaint and stipulation of facts heretofore filed herein, and upon all prior proceedings had herein, plaintiff, by his attorney, O. John Rogge, moves this Court for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, in favor of plaintiff and against defendant, for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact, and that plaintiff is entitled to a judgment as a matter of law, and for such other and further relief as to the Court may seem just and proper.

Dated: March 26, 1968

/s/ O. John Rogge
O. JOHN ROGGE

/s/ Milton P. Kroll
MILTON P. KROLL
Attorneys for Plaintiff

TO:

DAVID G. BRESS
United States Attorney

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Title Omitted]

DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

Defendant Secretary of State by his attorney, the United States Attorney for the District of Columbia, moves the Court for summary judgment in his favor on the ground that there is no issue as to any material fact, and defendant is entitled to judgment as a matter of law.

Defendant refers, in support hereof, to the "Stipulation of Facts" filed in this cause on March 21, 1968. A memorandum of points and authorities (styled "Brief in Support of Defendant's Motion for Summary Judgment") is herewith submitted.

/s/ David G. Bress
DAVID G. BRESS
United States Attorney

/s/ Joseph M. Hannon
JOSEPH M. HANNON
Assistant United States Attorney

/s/ Gil Zimmerman
GIL ZIMMERMAN
Assistant United States Attorney

Of Counsel:

CHARLES GORDON
General Counsel
Immigration and Naturalization Service

[Certificate of Service Omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 3002-67

ALDO MARIO BELLEI, PLAINTIFF

*v.*

DEAN RUSK, Secretary of State
of the United States of America, DEFENDANT

## OPINION

Messrs. Milton P. Kroll and Michael I. Smith for plaintiffs.

Messrs. David G. Bress, United States Attorney, Joseph M. Hannon, Assistant United States Attorney and Gil Zimmerman, Assistant United States Attorney, for defendants.

Before WRIGHT and LEVENTHAL, Circuit Judges, and SMITH, District Judge.

LEVENTHAL, Circuit Judge: Plaintiff, Aldo Mario Bellei, is a citizen of the United States by virtue of section 301(a)(7) of the Immigration and Nationality Act of 1952. That section confers American citizenship on children born of at least one American parent, even though such child is born outside of the United States.[1] Plaintiff brought this action against the Secretary of State to enjoin enforcement of section 301(b) of the 1952 Act, which if operative would terminate his Ameri-

[1] 8 U.S.C. § 1401(a)(7), as amended (Supp. III, 1968):

(a) The following shall be nationals and citizens of the United States at birth:

. . . .

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years . . . .

can citizenship. Subsection (b) of § 301 places a limitation on the grant of citizenship made by section 301 (a) (7) by making retention of American citizenship conditional upon completing a term of five years residence in the United States before age twenty-eight.[2] We hold that this section violates the requirements of the due process clause of the Fifth Amendment.

## I

The pertinent facts have been stipulated. Plaintiff was born in Italy in December, 1939, of an Italian-born father and an American-born mother. Plaintiff's parents have always been and continue to be citizens of their respective native lands.

Plaintiff, from birth, has been treated as an American citizen by the United States Government. He has been welcomed to this country without visas or other immigration papers required of foreigners. He has availed

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[2] 8 U.S.C. § 1401(b) (1964). This provision requires that such child spend at least five years in this country between the ages of fourteen and twenty-eight:

> (b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State [sic] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

The "continuous" presence requirement of section 1401(b) was liberalized in 1957, 71 Stat. 644 (1957), 8 U.S.C. 1401b (1964):

> In the administration of section 1401(b) of this title, absences from the United States of less than twelve months in the aggregate, during the period for which continuous physical presence in the United States is required, shall not be considered to break the continuity of such physical presence.

When Congress originally included this requirement in 1934, it required five years residence before the child reached age eighteen. *See* 48 Stat. 797. The 1940 reenactment was more generous, *see* 54 Stat. 1138-39, and the present law is even less strict, allowing the child until age twenty-eight to complete his five years of residence.

himself of his unlimited access to come to this country on several occasions and to visit with his mother's family. Plaintiff has also traveled at all times under American diplomatic protection. On his first two visits Bellei traveled on his mother's American passport. On the last two occasions when plaintiff visited the United States, he journeyed under his own American passport, which had been issued in 1952 and periodically renewed until 1964. He was subject to the military service laws and he registered for the draft in 1960.[3]

This controversy arises out of the State Department's refusal to extend or renew plaintiff's passport. When plaintiff sought to have his passport renewed in 1964, the Department denied his request. In 1961 the passport renewal office had noted on plaintiff's passport, "Warned abt. 301(b)." Plaintiff, after that warning, sought renewal in January, 1963, stating in his application that he resided in Havertown, Pennsylvania, giving his occupation as student, and indicating that he intended to remain abroad only three months. His application was granted, but the passport was validated only through July, 1963. At the time of this renewal plaintiff was twenty-three years old.

In July, 1963, plaintiff applied through the United States Embassy in Italy for a further extension. Again his request was honored, but he was reminded that he would no longer be considered a citizen, in view of section 301(b), if he remained abroad. The extension expired as of February 11, 1964. When plaintiff failed to return to this country prior to that date, the Department of State concluded that he was no longer a United States citizen, and he was orally informed of that conclusion by the American Embassy at Rome. His passport was accordingly deemed revoked. On February 14, plaintiff was also notified by the United States Selective Service that his liability for military service had terminated in view of his loss of citizenship. At that time plaintiff was over twenty-four years of age. Since 1964, plaintiff has again applied for an American passport and

[3] His scheduled induction in 1963 was deferred because of his employment with a NATO defense program.

has had his request turned down by a formal letter from the American consul in Italy.[4]

Plaintiff contends that enforcement of section 301(b) is contrary to the Fifth, Eighth, and Ninth Amendments to the Constitution. A three-judge court has been convened since the constitutionality of a federal law is drawn into question by this litigation.[5]

## II

Plaintiff contends that section 301(b) operates to strip a citizen of his citizenship and rests his case primarily on the pillar of due process which has become a bulwark for the protection of citizenship in recent Supreme Court decisions. *See Afroyim* v. *Rusk*, 387 U.S. 253 (1967); *Schneider* v. *Rusk*, 377 U.S. 163 (1964). While the facts of both cases are distinguishable, we think the *Afroyim* and *Schneider* opinions do stand for the proposition that in the absence of fraud Congress may not withdraw a citizenship, whether acquired at birth or by subsequent grant, that is not voluntarily renounced.[6] The position urged by the Government would require us to accord a "niggardly" reading that we think is incompatible with the broad and forceful position put forward by the Supreme Court to protect an important constitutional right. *Cf. Ullman* v. *United States*, 350 U.S. 422, 426 (1956).

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[4] We reproduce here the letter from the American consul:

> In reply to your verbal request for the issuance of an American passport in your name, your request is hereby denied since you no longer hold American nationality. This action is based on an instruction from the Department of State to this Embassy on September 1, 1964, in which the Department held that you had lost American nationality as of February 12, 1964, by your failure to be physically present in the United States for a period of five years between your fourteenth and twentythird birthdays, as required by Section 301(b) of the Immigration and Nationality Act as amended by Section 16 of the Act approved on September 11, 1957.

[5] 28 U.S.C. § 2282 (1964).

[6] The exception for the person who has acquired his citizenship by fraud is noted in *Afroyim* v. *Rusk*, 387 U.S. 253, 267 n. 23 (1967).

We turn first to *Schneider* v. *Rusk*, *supra*.[7] That case involved a statutory provision which provided:

> (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided in section 353 of this title, whether such residence commenced before or after the effective date of this Act. . . . Section 352, Immigration and Nationality Act of 1952, 66 Stat. 163, 269, 8 U.S.C. §§ 1101, 1484.

In holding that Congress could not constitutionally restrict the freedom of naturalized citizens to reside abroad in their native lands the Court said:

> A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons. 377 U.S. at 168-69.[8]

The Supreme Court's broad approach emerged even more clearly with *Afroyim* v. *Rusk*,[9] where the Court held that Congress could not take away citizenship from one who has not voluntarily relinquished it. The signifi-

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[7] 377 U.S. 163 (1964).

[8] *Compare* the 1940 enactment, 54 Stat. 1139, of what is now section 301, dropped over protest in 1952 (*see* 98 Cong.Rec. 5785 82d Cong., 2d Sess. 1952), providing specially for children whose American parent was engaged abroad on American-related business.

[9] 387 U.S. 253 (1967).

cance of *Afroyim* is illuminated by the fact that previously, following *Perez* v. *Brownell*, 356 U.S. 44 (1958), the Court had, in Justice Black's words "consistently invalidated on a case-by-case basis various other statutory provisions providing for involuntary expatriation. It has done so on various grounds and has refused to hold that citizens can be expatriated without their voluntary renunciation of citizenship." In *Afroyim* the Court overruled *Perez*, discarded the case-by-case approach, and sounded a general theme that was contrary to the previously stated assumption that Congress had the power to expatriate citizens in certain circumstances.

> Citizenship is no light trifle. . . . The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect *every* citizen of this Nation against forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship. 387 U.S. at 267-68. (Emphasis added.)

Section 301(a)(7) by its terms confers citizenship at birth.[10] Persons in plaintiff's situation are endowed at

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[10] The predecessor to section 301, § 1993 Revised Statutes, left open the question of whether the child beneficiary acquired citizenship at birth, or only upon compliance with conditions of declaring an intention to become a resident and taking an oath of allegiance required by section 6, Act of March 12, 1907, 34 Stat. 1228, 1229. The 1939 Act substituted the requirement of presence in the United States which is the forerunner of subsection (b). While the floor debates on the 1934 Act suggested that it was necessary to comply with the requirements of residence before citizenship could attach, the Attorney General in a contemporaneous construction concluded that the Act conferred citizenship at birth. *See* 38 Ops. Att'y. Gen'l. 10, 16-18 (1934); *see also* Weedin v. Chin Bow, 274 U.S. 657, 675 (1927), concluding, by implication, that the benefit of citizenship under the 1855 Act attached at birth.

birth with American citizenship and all its incidents and they enjoy its benefits during their formative years. The provisions of subsection (b) would operate to terminate the citizenship status for those persons, previously recognized as citizens, who do not take the steps set forth in (b). While plaintiff did not take up residence in this country in 1963, as provided by section 301(b), he had declared his intention to do so. During this period of citizenship, he was subject to American jurisdiction as a citizen [11] and also subject to other duties of citizenship such as military service. Now he is independent of youthful ties to family and wants to come to the United States. In view of the prior grant of citizenship to plaintiff we do not think Congress can now slam the door in his face. Whatever the reason plaintiff remained abroad, family ties or schooling, Congress cannot terminate his citizenship on the ground that he only enjoyed a second-class citizenship, one that restricted his "rights to live and work abroad in a way that other citizens may." This is contrary to *Schneider* and *Afroyim*.

## III

The Government relies on the fact that *Schneider* and *Afroyim* protected plaintiffs who traced their citizenship to naturalization. It is argued that the Fourteenth Amendment's due process clause guards only that citizenship that is constitutionally conferred, citizenship acquired by birth in the United States or by naturalization, and is inapplicable to citizenship conferred by a statute that is not an act of naturalization. We see no basis for the distinction. It may be that there is more than one Constitutional source of Congressional authority to grant and define citizenship, that there is power deriving from the naturalization clause, Act I, § 8, cl. 4, and also authority [12] deriving from implied powers of

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[11] Blackmer v. United States, 281 U.S. 432 (1932).

[12] What appears to be the earliest ancestor of section 301(a) is the Act of March 26, 1790, 1 stat. 103, 104, which was an Act to establish a uniform rule of naturalization. *See* n. 16, infra.

Congress.[13] In any event, however, the recognition or grant of U.S. citizenship is lawful only because this is within the power of Congress under the Constitution.

We see no basis for concluding that the Supreme Court was declaring a due process protection to citizenship granted by a naturalization act that did not extend to citizenship granted by another act.[14]

The Government argues in the alternative that even if congressional power to enact conditions on citizenship is limited by due process, section 301(b) contains reasonable conditions and is, therefore, constitutional. It is urged that section 301(b) is simply a reasonable way

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[13] Article I, § 8 authorizes Congress "to establish a uniform Rule of Naturalization." We need not here decide whether there exists an implied power in foreign relations that would justify legislation like that before us. *See* Henkin, The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations, 107 U.Pa. L.Rev. 903 (1959). Other possibilities exist for jusitfying congressional legislation to define citizenship. The term "naturalization" appears in the text of the Constitution without definition. The need for explication may well serve to sustain legislation. *Compare* Katzenbach v. Morgan, 384 U.S. 641 (1966).

[14] We do not think a contrary view was intended by Justice Black's majority opinion in *Afroyim*, that

> the [Fourteenth] Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit. 387 U.S. at 262.

*See also* Justice Warren's dissent in Perez v. Brownell:

> The Government is without power to take citizenship away from a native-born or lawfully naturalized American. The Fourteenth Amendment recognizes that this priceless right is immune from the exercise of arbitrary governmental powers.

356 U.S. at 77-78.

It is hardly consistent with the farreaching holding of *Afroyim* to attribute to Justice Black's language an intention to leave unprotected a broad class of citizens. The holding is case in broad terms and draws no distinction among types of citizenship. *See* Afroyim v. Rusk, 387 U.S. at 267-68. Moreover, there is no reason to believe that Justice Black meant to vary settled doctrine that due process protects persons.

of assuring that children of hybrid origin give some affirmative indication of desiring to be part of our society as well as avail themselves of our protection and the opportunity to come to this country whenever it proves expedient.[15] Our attention is directed to the background and legislative history of section 301 which, according to the Government, reveals that the purpose of subsection (b) of § 301 is to assure that these children of mixed allegiance have some connection to the state that is offering them its protection and other benefits of citizenship.[16]

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[15] *Compare Perkins* v. *Elg*, 307 U.S. 325 (1939), approving by implication an election requirement for persons who bear dual citizenship; *see also Savorgnam* v. *United States*, 338 U.S. 491 (1950), holding that voluntary naturalization in a foreign state is a valid basis for expatriating an American citizen, even though there was no desire or intention or awareness that the act of naturalization would operate to divest citizenship. For a discussion of problems arising out of dual nationality, *see generally* Scharf, A Study of the Law of Expatriation, 38 St. Johns L.Rev. 251, 271-75 (1964).

[16] Section 301 can be traced to early legislation, dating back to the infancy of the Republic. As early as 1790 Congress provided for the transmission of citizenship by descent. The first such statute was framed as a limitation. "[T]he right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Section 1, Act of March 26, ~~1790~~, 1 Stat. 103, 104. 1790
That section was reenacted and finally codified as § 1993 of Revised Statutes. The 1855 Act was a response to an 1854 article, criticizing the earlier formulations for not providing citizenship for those children of American paternity who were born abroad. *See* Binney, 2 Amer. Law Reg. 193; *see also* 2 Kent Commentaries 14. In 1934 Congress eliminated the obvious inequity of extending the benefit of citizenship to only those children with paternal ties to the United States. *See* 78 Cong. Rec. 7344 (73rd Cong., 2d Sess.). At this juncture Congress also included the five years presence requirement which is now section (b) of the statute. Sec. 1, Act of May 24, 1934, 48 Stat. 797.

The forerunner of subsection (b) was Section 6, Act of March 12, 1907, 34 Stat. 1228-29, which provided:

> That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of

The Government's contention is not without appeal, and we have pondered the matter carefully. There is an undeniable danger that children, born and raised abroad, in a foreign home, where English may never be spoken, schooled where English is not taught, celebrating foreign holidays with the family of the non-American parent, will have no meaningful connection with the United States, its culture or heritage. It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States.[17] We hold only that Congress may not proceed by granting citizenship, and then either qualifying the grant by creating a second class citizenship or terminating the grant.[18] The broad teaching of *Afroyim* and *Schneider* is that once American citizenship has been recognized or conferred, Congress may not remove the

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this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

[17] We recognize that "jus sanguinis" may provide a tenuous link to the national state when citizenship is conferred by virtue of the citizenship of only one parent. Yet we are not confronted with the specter of generations of child emigres who will return to this country to claim citizenship. Section 301(a)(7) itself requires that a parent have lived in the United States ten years as a prerequisite to transmitting citizenship to a foreign-born child.

[18] After argument was heard in this case the Attorney General promulgated a Department ruling setting forth the procedure that would be followed in expatriation cases after *Afroyim* v. *Rusk*. The gist of the memorandum is that each case will be taken on an individual basis to ascertain whether the individual involved actually intended to relinquish his American citizenship, assuming he puts the question of intent at issue. Since the new procedure "does not necessarily apply to the loss of U. S. citizenship acquired as a result of birth abroad to a citizen parent or parents," we have no occasion to consider the legal significance or soundness of the Department ruling, which appears at 34 Fed. Reg. 1079 (January 23, 1969).

status; it is for the citizen to abandon his citizenship voluntarily.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS GRANTED: DEFENDANT'S CROSS-MOTION IS DENIED.

/s/ J. Skelly Wright
J. SKELLY WRIGHT
United States Circuit Judge

/s/ Harold Leventhal
HAROLD LEVENTHAL
United States Circuit Judge

/s/ John Lewis Smith, Jr.
JOHN LEWIS SMITH, JR.
United States District Judge

Washington, D. C.

February 28, 1969

LEVENTHAL, Circuit Judge, concurring: I add to the opinion I have written for the court a few words that help me place this case in perspective.

We did not have before us in this case a statute that set conditions as a prerequisite for the grant of citizenship. Therefore we did not have occasion to consider to what extent Congress could impose such conditions and what kind of conditions, if any, it could impose. My own assumption is that Congress can impose reasonable conditions that must be met before citizenship is recognized.[1] But that is not the course that Congress wanted

[1] While Congress would have wide latitude in drafting a condition precedent to its grant of citizenship, such conditions would have to comply with the fundamental requirements of equal protection and due process. *Compare* French, Unconstitutional Conditions: An Analysis, 50 Geo. L.J. 234 (1961).

to follow here. It wanted the child beneficiary governed by § 301(a)(7) to be a citizen at birth, with advantages of United States diplomatic protection and other benefits of citizenship, and perhaps with the corollary opportunity to resist citizenship claims of other countries.[2]

Nor were we required to consider a statute in which residence abroad was not established as an operative fact terminating citizenship, but was given significance only as an evidentiary fact indicative of a voluntary relinquishment of citizenship.[3]

/s/ Harold Leventhal
HAROLD LEVENTHAL
United States Circuit Judge

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[2] *See* Borchard, Diplomatic Protection of Citizens Abroad § 200, at 462.

[3] *Compare* Chief Justice Warren's dissent in *Perez* v. *Brownell*, which states that "certain voluntary conduct results in an impairment of the status of citizenship," 356 U.S. at 69, and that "United States citizenship can be abandoned, temporarily or permanently, by conduct showing a voluntary transfer of allegiance to another country." 356 U.S. at 73; *compare also* Justice Black's concurring opinion in *Nishikawa* v. *Dulles*, 356 U.S. 129, 139 (1958), where he noted, "Although Congress may provide rules of evidence for [determining when there has been voluntary relinquishment], it cannot declare that such equivocal acts as service in a foreign army, participation in a foreign election or desertion from our armed forces, establish a conclusive presumption of intention to throw off American nationality. [Citation omitted.] Of course such conduct may be highly persuasive evidence in the particular case of a purpose to abandon citizenship."

## JUDGMENT

Bellei v. Rusk, Secretary of States
Civ. Act. 3002-67

In accordance with our memorandum opinion and order of February 28, 1969, it is hereby adjudged, declared and decreed:

(1) That Section 301 (b) of the Immigration and Naturalization Act, 8 U.S.C. § 1401 (b) is unconstitutional; and,

(2) That plaintiff is a citizen of the United States and is entitled to all the rights and privileges appertaining to a citizen of the United States.

/s/ J. Skelly Wright
J. SKELLY WRIGHT
Circuit Judge

/s/ Harold Leventhal
HAROLD LEVENTHAL
Circuit Judge

/s/ John Lewis Smith, Jr.
JOHN LEWIS SMITH
District Judge

Washington, D. C.

May 22, 1969

SUPREME COURT OF THE UNITED STATES

No. 179, October Term, 1969

WILLIAM P. ROGERS, Secretary of State, APPELLANT

*v.*

ALDO MARIO BELLEI

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

October 13, 1969

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# INDEX



CITATIONS

# In the Supreme Court of the United States

OCTOBER TERM, 1968

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No.——

WILLIAM P. ROGERS, SECRETARY OF STATE, APPELLANT

*v.*

ALDO MARIO BELLEI

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

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## JURISDICTIONAL STATEMENT

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### OPINIONS BELOW

The opinions of the district court granting appellee's motion for summary judgment (App., pp. 17–30, *infra*) are reported at 296 F. Supp. 1247.

### JURISDICTION

On May 22, 1969, a three-judge district court entered its judgment (App., p. 31, *infra*) declaring that Section 301(b) of the Immigration and Nationality Act, 8 U.S.C. 1401(b), is unconstitutional. A notice of appeal was filed in the district court on May 23, 1969. Jurisdiction over this direct appeal is conferred by 28 U.S.C. 1253, which authorizes any party to take a direct appeal from a decision granting or denying an injunction in a proceeding required by 28 U.S.C. 2282 to have been heard and determined by a district

court composed of three judges, *Schneider* v. *Rusk,* 372 U.S. 224, 225; *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 152–155, *Schneider* v. *Rusk,* 377 U.S. 163, 165; *Zemel* v. *Rusk,* 381 U.S. 1, 5–7. Direct appellate jurisdiction alternatively rests on 28 U.S.C. 1252, because an Act of Congress has been held unconstitutional in a civil proceeding to which an officer of the United States is a party. See *Katzenbach* v. *McClung,* 379 U.S. 294, 295–296; *Rusk* v. *Cort,* 369 U.S. 367, 370–371 n. 4; *United States* v. *Raines,* 362 U.S 17, 20.

## QUESTION PRESENTED

Whether either the Due Process Clause of the Fifth Amendment or the Citizenship Clause of the Fourteenth Amendment deprives Congress of the power to attach to the statutory grant of citizenship to a person born abroad of one citizen-parent the condition subsequent that, in order to retain such citizenship, he must come to this country and live here for five years before attaining the age of twenty-eight.

## STATUTES INVOLVED

Section 1993 of the Revised Statutes, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, provided:

> Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided

in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.

Section 301 of the Immigration and Nationality Act, 8 U.S.C. 1401, provides in pertinent part:

(a) The following shall be nationals and citizens of the United States at birth:

* * * * *

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: Provided, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the

United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[s] for at least five years: *Provided,* That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: *Provided,* however, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born aboard subsequent to May 24, 1934, who, prior to the effective date of this Act, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

## STATEMENT

Appellee, Aldo Mario Bellei, filed this action against the Secretary of the State seeking declaratory and injunctive relief against the operation of Section 301(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1401(b), on the ground the section's provision for loss of citizenship is unconstitutional.[1] The facts were stipulated, and the prop-

[1] The action was originally filed in the United States District Court for the Southern District of New York, but because venue was not proper there, see 28 U.S.C. 1391(e), the suit was transferred to the District Court for the District of Columbia pursuant to 28 U.S.C. 1406(a).

erly convened three-judge district court granted appellee's motion for summary judgment, holding the statute void and confirming his continued American citizenship (see Appendix, pp. 17–31, *infra.*).

1. Appellee's father has always been a citizen of Italy and never acquired United States citizenship. His mother was born in the United States and has always been, by American law, an American citizen. A few days after his parents' marriage in the United States on March 14, 1939, they left for Italy, where appellee was born on December 22, 1939. The family has since resided there.

At the time of his birth in Italy appellee became, and still is, a citizen of Italy. Under the terms of Section 1993 of the Revised Statutes, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, he also acquired United States citizenship at his birth abroad to an American citizen. That statute also provided, however, that in order to retain the United States citizenship acquired under such circumstances, he had to come to the United States and reside here for at least five years immediately prior to his eighteenth birthday and take an oath of allegiance to the United States after he reached the age of twenty-one. These requirements were liberalized somewhat by the Nationality Act of 1940 (see Section 201(g), 54 Stat. 1139), and were further relaxed by Section 301(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1401(b), which specifies that for a person born abroad to one American parent after May 24, 1934 (see Section 301(c)) all he need do to retain the citizenship conferred on him is to reside in the United

States for five continuous years some time between his fourteenth and twenty-eighth birthdays.[2]

2. For most of his life appellee lived in Italy, the country of his birth. Recently he took up residence in England. Although he has come to the United States on five brief visits, appellee has never established residence in this country. Therefore he admittedly failed to comply with the conditions for retention of his American citizenship as prescribed in the 1934 Act which conferred American citizenship on him, or with the more generous provisions of subsequent statutes.

On his first two trips to the United States, in 1948 and 1951, appellee traveled on his mother's American passport. On his next trips in 1955 and 1962, he traveled on his own United States passport, which was periodically renewed until December 22, 1962, his twenty-third birthday. In connection with the last two renewals of his passport, he was expressly advised of the need to establish residence in the United States prior to his twenty-third birthday if he wished to retain the United States citizenship he had acquired at his birth in Italy. When he failed to do so, the Department of State notified him that he had lost his United States citizenship. Thereafter he used his Italian passport in 1965, when he was admitted to the United States as an alien visitor.

3. In this suit appellee contended that the conditions for retention of his citizenship prescribed by Section 301(b) of the Immigration and Nationality Act are

[2] Absences from the country for an aggregate of less than twelve months do not break the continuity of the five-year residence required. See 8 U.S.C. 1401b.

unconstitutional, and therefore that he had not lost his citizenship. On February 28, 1969, a three-judge district court granted appellee's motion for summary judgment, finding Section 301(b) invalid under the authority of *Afroyim* v. *Rusk*, 387 U.S. 253, and *Schneider* v. *Rusk*, 377 U.S. 163.

### THE QUESTION IS SUBSTANTIAL

The decision below, invalidating the conditions on which Congress elected to bestow American citizenship on children born abroad to one citizen and one alien parent, manifestly involves a question of considerable importance. An authoritative ruling by this Court on the constitutional question involved would clarify the citizenship status of many persons in a situation similar to appellee's.[3] In addition, a decision

[3] We are informed that during fiscal years 1964–1968, the Department of State found that 661 persons had lost their United States citizenship under Section 301(b). The Immigration and Naturalization Service has under consideration about 25 cases in which possible loss of United States citizenship under that section is involved. The Department of State has no precise figures but estimates that several hundred such cases are pending throughout the world in the various consular offices of the United States. This issue is also in litigation in a case pending in the federal court in California, *Vincente Gonzales-Gomez* v. *Immigration & Naturalization Service*, E.D. Calif., Civ. No. F–151.

In response to requests by the Department of State and the Immigration and Naturalization Service for guidelines to be followed in light of *Afroyim*, the Attorney General on January 18, 1969, issued a Statement of Interpretation which was expressly made inapplicable to loss of citizenship under Section 301(b), here involved. 34 Fed Reg. 1079 (1969). The Statement also notes that the "ultimate determination" of the effect of the broad language in *Afroyim* must be left to the courts.

by this Court in the present case could significantly affect resolution of the citizenship status of several thousand persons whose cases arise under other sections of the statute and are presently under consideration by the Department of State and the Immigration and Naturalization Service. In our view, the ruling below is erroneous; at the least, it presents a substantial question.

1. The court below rested its decision primarily on *Afroyim* v. *Rusk*, 387 U.S. 253, but that reliance was misplaced. The first clause of the Fourteenth Amendment declares that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States * * *." *Afroyim* involved a naturalized American citizen who traced his citizenship to this constitutional clause, and the Court phrased the issue before it as

> whether Congress can consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up. [387 U.S. at 256.]

The Court resolved this question by explaining that

> [t]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, *this Fourteenth Amendment citizenship* was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit. [387 U.S. at 262; emphasis added.]

But the present case does not involve a category of United States citizenship guaranteed and pro-

tected by the Fourteenth Amendment, for appellee was neither "born [n]or naturalized in the United States." Rather, his citizenship is traceable to a grant which Congress was free to confer or withhold at will. Indeed, citizenship like this has long been recognized as attaching only whenever, and on whatever conditions, Congress has from time to time elected to confer it. As the Court explained in *United States* v. *Wong Kim Ark*, 169 U.S. 649, 688:

> This sentence [the citizenship clause] of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed—"born in the United States," "naturalized in the United States", and "subject to the jurisdiction thereof"—in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents: and has left that subject to be regulated, as it always has been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.

As an illustration of the complete dependence of extraterritorial citizenship upon congressional choice, it is generally believed that through legislative oversight children born abroad to American parents between 1802 and 1855 acquired United States citizenship only if their parents were born or naturalized in the United States prior to 1802. See *United States* v. *Wong Kim Ark, supra,* 169 U.S. at 673–674;

*Weedin* v. *Chin Bow,* 274 U.S. 657, 663; *Montana* v. *Kennedy,* 366 U.S. 308, 311. So also, at no time until 1934 could a child born abroad acquire American citizenship at birth unless his *father* was a United States citizen. And, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, allowing American mothers equal capacity to transmit citizenship,[4] Section 1993 of the Revised Statutes "provided the sole source of inherited citizenship status for foreign born children." *Montana* v. *Kennedy, supra,* 366 U.S. at 312. Thus, had appellee been born six years earlier, he would have had no claim at all to American citizenship. Since appellee acquired United States citizenship when born to an American mother and an alien father outside this country only by reason of this amended *statute,* the decision in *Afroyim,* dealing with constitutional citizenship, cannot properly be said to have resolved the issue presented in this case, namely, whether Congress may attach a reasonable condition subsequent governing retention of the citizenship conferred by the statute and not dependent on the Fourteenth Amendment.[5]

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[4] See S. Rep. No. 865, 73d Cong. 2d Sess., pp. 1–2 (1934); H. Rep. No. 131, 73d Cong., 1st Sess., p. 2 (1933).

[5] We also note that *Afroyim* was expressly concerned with Congress's power to "expatriate" American citizens against their will. Unlike the various grounds for expatriation set forth in Section 349 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1481, involved in *Afroyim* and the other cases which had "consistently invalidated" these provisions "on a case-by-case basis", 387 U.S. at 255, the provision before the Court in the instant case, Section 301(b), contains a condition directly annexed to the grant of citizenship itself, providing that the citizenship so conferred will expire unless perfected

2. The other decision relied on by the district court was *Schneider* v. *Rusk,* 377 U.S. 163. But *Schneider* does not warrant the result reached below. In that case, the Court held that equal-protection principles implicit in the Due Process Clause of the Fifth Amendment prevented *unreasonable* discrimination against naturalized citizens, denying them equal treatment with the native born. But if the apparent per-se rule established in *Afroyim* does not apply in this case, where Fourteenth Amendment citizenship is not involved, the general test of reasonableness (applied in *Schneider*) becomes the controlling standard for gauging the validity of what Congress has done. Since Section 301(b) is in accordance with due process requirements it should have been sustained.

Even the district court agreed that Section 301(b) is not unreasonable or discriminatory, but merely reflects a "legitimate concern of Congress" and represents a narrowly drawn response to "an undeniable danger" (App., pp. 27–28, *infra*). It refused to sustain the statute, despite these critical concessions, only because of its view, undoubtedly colored by reliance on *Afroyim,* that "Congress may not proceed by granting citizenship, and then either qualifying the grant by creating a second class citizenship or terminating the grant." (App., p. 28, *infra*). In adopting this approach, the court below failed to attribute proper weight to the historical development of the

within a certain period. We question whether appellee can be heard to claim the citizenship that has been conferred on him while at the same time repudiating the conditions on which Congress saw fit to grant it.

congressional policy of granting citizenship at birth abroad and the effect of conditioning such a grant upon fulfillment of a reasonable domestic residence requirement.

Congress has always prescribed conditions circumscribing the acquisition of United States citizenship by children born abroad to American parents.[6] The first such statute specified that "the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Section 1, Act of March 26, 1790, 1 Stat. 103. Similar conditions have appeared in every subsequent statute dealing with this subject, including Section 1993 of the Revised Statutes.

In 1927, this Court ruled that under R.S. 1993, citizenship could be transmitted to a child born abroad only if the citizen-father had resided in the United States *prior* to the child's birth. *Weedin* v. *Chin Bow*, 274 U.S. 657; see, also, *D'Alessio* v. *Lehmann*, 289 F. 2d 317 (C.A. 6), certiorari denied, 368 U.S. 822. In settling on this construction, the Court explained that a contrary interpretation, awarding citizenship to a child whose father did not take up residence in the United States until after the child's birth, would

> extend citizenship to a generation whose birth, minority and majority, whose education, and whose family life, have all been out of the United States and naturally within the civilization and environment of an alien country. The beneficiaries would have evaded the duties and

[6] The ancestor British statutes included similar reservations. See *Weedin* v. *Chin Bow*, 274 U.S. 657, 661.

> responsibilities of American citizenship. * * * [274 U.S. at 667.][7]

When Congress in 1934 decided to create American citizenship for children born overseas of an American mother, similar considerations were seen as justifying a conditional grant. The legislative judgment proceeded on the wholly reasonable premise that such children should be treated differently from those born abroad *both* of whose parents were United States citizens, for "such persons are likely, as a rule, to bring up their children as Americans, to see that they speak the English language, and to have them imbued with American ideals." *Report by the Secretary of State, the Attorney General, and the Secretary of Labor on Revision and Codification of the Nationality Laws of the United States*, House Immigration and Naturalization Committee Print, 76th Cong., 1st Sess., Part I, p. 14 (1938) (hereafter "Nationality Laws Revision"); see, also, S. Rep. No. 2150, 76th Cong., 3d Sess., p. 4 (1940). As the court below itself remarked:

> There is an undeniable danger that children, born and raised abroad, in a foreign home, where English may never be spoken, schooled where English is not taught, celebrating foreign holidays with the family of the non-American parent, will have no meaningful connection with the United States, its culture or

[7] Later statutes have removed the ambiguity in *Chin Bow*, and now specify that any requisite prior residence of the parent must precede the child's birth. See Section 301(a) (3), (4), (5), (7), Immigration and Nationality Act, 8 U.S.C. 1401(a) (3), (4), (5), (7).

> heritage. It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States. * * * [App., pp. 27–28, *infra*].

This is precisely the situation in the present case, where appellee, now almost 30 years old, has been in the country only on five brief visits and has never lived here.[8]

3. It is true that prior to 1934 the prescribed conditions related only to the status of the parents and were conditions *precedent* to the attachment of citizenship status. The conditions for retention of American citizenship by a child born abroad to a single citizen parent, prescribed by the 1934 Act and later statutes, can be regarded as conditions subsequent. See 38 Ops. Att'y Gen. 10, 17–18 (1934); Nationality Laws Revision, *supra*, p. 9. The district court thought this distinction critical, suggesting that while Congress could assure some meaningful relationship with this country by deferring the vesting of citizenship in categories not controlled by the Fourteenth Amendment, it could not confer it immediately, subject to reasonable conditions. But it seems to us that where the availability of citizenship itself turns on legislative grant, if Congress has power to condition its acquisition on compliance with certain requirements, as it concededly does, there is no basis for denying power to condition *retention* of the citizenship on the

[8] There is no contention that appellee's failure to comply with the conditions imposed upon the grant of citizenship was due to ignorance or mistake. It was stipulated that he was warned several times of the need to begin residence in the United States no later than his twenty-third birthday.

identical terms, especially when the appropriate condition is one which gives the affected person ample time to make an election after he reaches maturity.

What is more, the result decreed below would compel Congress to adopt a less generous policy than has benefited appellee, if it wishes to preserve the assurances of a nexus with this country that have characterized the statutes on this subject since 1790. The 1934 amendment provided that "the rights of citizenship shall not descend" until the child established the requisite residence in the United States, but the Attorney General promptly construed this language liberally in favor of the foreign born child, holding that citizenship attached immediately, "subject to being divested" if the prescribed residence requirement is not established. 38 Ops. Att'y Gen. 10, 18 (1934). The 1940 and 1952 Acts explicitly confirmed that Congress preferred to confer citizenship immediately at birth, *but* on the assumption—constitutional, we believe—that the citizenship would expire if not perfected by fulfilling the subsequent residence conditions.[9] There is considerable doubt, in light of this historic policy, whether Congress would have chosen to extend American citizenship to appellee and others in his class if it was unable validly to impose the conditions which were regarded as intimate and unseverable concomitants of the grant.

There is no warrant for invalidating the benign flexibility Congress has shown. Certainly the prior decisions of this Court do not inflexibly require that

[9] See H. Rep. No. 1365, 82d Cong., 2d Sess., p. 76 (1952).

Congress must choose solely between the stark extremes of conferring unconditional United States citizenship at birth on a person who may never have any contact with American institutions and ideals or deferring all the privileges of American citizenship until the foreign-born person reaches, for instance, his twenty-eighth birthday, as would be required under a statute like the present one.

## CONCLUSION

It is therefore respectfully submitted that probable jurisdiction should be noted.

ERWIN N. GRISWOLD,
*Solicitor General.*

WILL WILSON,
*Assistant Attorney General.*

PHILIP A. LACOVARA,
*Assistant to the Solicitor General.*

BEATRICE ROSENBERG,
*Attorney.*

CHARLES GORDON,
*General Counsel,*
*Immigration and Naturalization Service.*

MAY 1969.

# APPENDIX

United States District Court for the

District of Columbia

Civil Action No. 3002–67

ALDO MARIO BELLEI, PLAINTIFF

*v.*

DEAN RUSK, SECRETARY OF STATE OF THE UNITED STATES OF AMERICA, DEFENDANT

Before WRIGHT and LEVENTHAL, *Circuit Judges*, and SMITH, *District Judge*.

LEVENTHAL, *Circuit Judge*. Plaintiff, Aldo Mario Bellei, is a citizen of the United States by virtue of section 301(a)(7) of the Immigration and Nationality Act of 1952. That section confers American citizenship on children born of at least one American parent, even though such child is born outside of the United States.[1] Plaintiff brought this action against

[1] 8 U.S.C. § 1401(a)(7), as amended (Supp. III, 1968):

> (a) The following shall be nationals and citizens of the United States at birth:
>
> * * * * *
>
> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years * * *.

the Secretary of State to enjoin enforcement of section 301(b) of the 1952 Act, which if operative would terminate his American citizenship. Subsection (b) of § 301 places a limitation on the grant of citizenship made by section 301(a)(7) by making retention of American citizenship conditional upon completing a term of five years residence in the United States before age twenty-eight.[2] We hold that this section violates the requirements of the due process clause of the Fifth Amendment.

[2] 8 U.S.C. § 1401(b) (1964). This provision requires that such child spend at least five years in this country between the ages of fourteen and twenty-eight:

> (b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State [sic] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

The "continuous" presence requirement of section 1401(b) was liberalized in 1957, 71 Stat. 644 (1957), 8 U.S.C. 1401b (1964):

> In the administration of section 1401(b) of this title, absences from the United States of less than twelve months in the aggregate, during the period for which continuous physical presence in the United States is required, shall not be considered to break the continuity of such physical presence.

When Congress originally included this requirement in 1934, it required five years residence before the child reached age eighteen. *See* 48 Stat. 797. The 1940 reenactment was more generous, *see* 54 Stat. 1138–39, and the present law is even less strict, allowing the child until age twenty-eight to complete his five years of residence.

## I

The pertinent facts have been stipulated. Plaintiff was born in Italy in December, 1939, of an Italian-born father and an American-born mother. Plaintiff's parents have always been and continue to be citizens of their respective native lands.

Plaintiff, from birth, has been treated as an American citizen by the United States Government. He has been welcomed to this country without visas or other immigration papers required of foreigners. He has availed himself of his unlimited access to come to this country on several occasions and to visit with his mother's family. Plaintiff has also traveled at all times under American diplomatic protection. On his first two visits Bellei traveled on his mother's American passport. On the last two occasions when plaintiff visited the United States, he journeyed under his own American passport, which had been issued in 1952 and periodically renewed until 1964. He was subject to the military service laws and he registered for the draft in 1960.[3]

This controversy arises out of the State Department's refusal to extend or renew plaintiff's passport. When plaintiff sought to have his passport renewed in 1964, the Department denied his request. In 1961 the passport renewal office had noted on plaintiff's passport, "Warned abt. 301(b)." Plaintiff, after that warning, sought renewal in January, 1963, stating in his application that he resided in Havertown, Pennsylvania, giving his occupation as student, and indicating that he intended to remain abroad only three

[3] His scheduled induction in 1963 was deferred because of his employment with a NATO defense program.

months. His application was granted, but the passport was validated only through July, 1963. At the time of this renewal plaintiff was twenty-three years old.

In July, 1963, plaintiff applied through the United States Embassy in Italy for a further extension. Again his request was honored, but he was reminded that he would no longer be considered a citizen, in view of section 301(b), if he remained abroad. The extension expired as of February 11, 1964. When plaintiff failed to return to this country prior to that date, the Department of State concluded that he was no longer a United States citizen, and he was orally informed of that conclusion by the American Embassy at Rome. His passport was accordingly deemed revoked. On February 14, plaintiff was also notified by the United States Selective Service that his liability for military service had terminated in view of his loss of citizenship. At that time plaintiff was over twenty-four years of age. Since 1964, plaintiff has again applied for an American passport and has had his request turned down by a formal letter from the American consul in Italy.[4]

Plaintiff contends that enforcement of section 301 (b) is contrary to the Fifth, Eighth, and Ninth

[4] We reproduce here the letter from the American consul:

> In reply to your verbal request for the issuance of an American passport in your name, your request is hereby denied since you no longer hold American nationality. This action is based on an instruction from the Department of State to this Embassy on September 1, 1964, in which the Department held that you had lost American nationality as of February 12, 1964, by your failure to be physically present in the United States for a period of five years between your fourteenth and twentythird [sic] birthdays, as required by Section 301(b) of the Immigration and Nationality Act as amended by Section 16 of the Act approved on September 11, 1957.

Amendments to the Constitution. A three-judge court has been convened since the constitutionality of a federal law is drawn into question by this litigation.[5]

## II

Plaintiff contends that section 301(b) operates to strip a citizen of his citizenship and rests his case primarily on the pillar of due process which has become a bulwark for the protection of citizenship in recent Supreme Court decisions. *See Afroyim* v. *Rusk,* 387 U.S. 253 (1967); *Schneider* v. *Rusk,* 377 U.S. 163 (1964). While the facts of both cases are distinguishable, we think the *Afroyim* and *Schneider* opinions do stand for the proposition that in the absence of fraud Congress may not withdraw a citizenship, whether acquired at birth or by subsequent grant, that is not voluntarily renounced.[6] The position urged by the Government would require us to accord a "niggardly" reading that we think is incompatible with the broad and forceful position put forward by the Supreme Court to protect an important constitutional right. *Cf. Ullman* v. *United States,* 350 U.S. 422, 426 (1956).

We turn first to *Schneider* v. *Rusk, supra.*[7] That case involved a statutory provision which provided:

> (a) A person who has become a national by naturalization shall lose his nationality by—
>
> (1) having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated, except as provided

[5] 28 U.S.C. § 2282 (1964).

[6] The exception for the person who has acquired his citizenship by fraud is noted in Afroyim v. Rusk, 387 U.S. 253, 267 n. 23 (1967).

[7] 377 U.S. 163 (1964).

> in section 353 of this title, whether such residence commenced before or after the effective date of this Act * * *. Section 352, Immigration and Nationality Act of 1952, 66 Stat. 163, 269, 8 U.S.C. §§ 1101, 1484.

In holding that Congress could not constitutionally restrict the freedom of naturalized citizens to reside abroad in their native lands the Court said:

> A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native-born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons. 377 U.S. at 168–69.[8]

The Supreme Court's broad approach emerged even more clearly with *Afroyim* v. *Rusk*,[9] where the Court held that Congress could not take away citizenship from one who has not voluntarily relinquished it. The significance of *Afroyim* is illuminated by the fact that previously, following *Perez* v. *Brownell*, 356 U.S. 44 (1958), the Court had, in Justice Black's words "consistently invalidated on a case-by-case basis various other statutory provisions providing for involuntary expatriation. It has done so on various grounds and

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[8] *Compare* the 1940 enactment, 54 Stat. 1139, of what is now section 301, dropped over protest in 1952 (*see* 98 Cong. Rec. 5785, 82d Cong., 2d Sess. 1952), providing specially for children whose American parent was engaged abroad on American-related business.

[9] 387 U.S. 253 (1967).

has refused to hold that citizens can be expatriated without their voluntary renunciation of citizenship." In *Afroyim* the Court overruled *Perez,* discarded the case-by-case approach, and sounded a general theme that was contrary to the previously stated assumption that Congress had the power to expatriate citizens in certain circumstances.

> Citizenship is no light trifle * * *. The very nature of our free government makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship. We hold that the Fourteenth Amendment was designed to, and does, protect *every* citizen of this Nation against forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship. 387 U.S. at 267–68. (Emphasis added.)

Section 301(a)(7) by its terms confers citizenship at birth.[10] Persons in plaintiff's situation are endowed at

[10] The predecessor to section 301, § 1993 Revised Statutes, left open the question of whether the child beneficiary acquired citizenship at birth, or only upon compliance with conditions of declaring an intention to become a resident and taking an oath of allegiance required by section 6, Act of March 12, 1907, 34 Stat. 1228, 1229. The 1934 Act substituted the requirement of presence in the United States which is the forerunner of subsection (b). While the floor debates on the 1934 Act suggested that it was necessary to comply with the requirements of residence before citizenship could attach, the Attorney General in a contemporaneous construction concluded that the Act conferred citizenship at birth. *See* 38 Ops. Att'y. Gen'l. 10, 16–18 (1934); *see also* Weedin v. Chin Bow, 274 U.S. 657, 675 (1927), concluding, by implication, that the benefit of citizenship under the 1855 Act attached at birth.

birth with American citizenship and all its incidents and they enjoy its benefits during their formative years. The provisions of subsection (b) would operate to terminate the citizenship status for those persons, previously recognized as citizens, who do not take the steps set forth in (b). While plaintiff did not take up residence in this country in 1963, as provided by section 301(b), he had declared his intention to do so. During this period of citizenship, he was subject to American jurisdiction as a citizen [11] and also subject to other duties of citizenship such as military service. Now he is independent of youthful ties to family and wants to come to the United States. In view of the prior grant of citizenship to plaintiff we do not think Congress can now slam the door in his face. Whatever the reason plaintiff remained abroad, family ties or schooling, Congress cannot terminate his citizenship on the ground that he only enjoyed a second-class citizenship, one that restricted his "rights to live and work abroad in a way that other citizens may." This is contrary to *Schneider* and *Afroyim*.

## III

The Government relies on the fact that *Schneider* and *Afroyim* protected plaintiffs who traced their citizenship to naturalization. It is argued that the Fourteenth Amendment's due process clause guards only that citizenship that is constitutionally conferred, citizenship acquired by birth in the United States or by naturalization, and is inapplicable to citizenship conferred by a statute that is not an act of naturalization. We see no basis for the distinction. It may be that there is more than one Constitutional source of Congressional authority to grant and define citizen-

[11] Blackmer v. United States, 281 U.S. 432 (1932).

ship, that there is power deriving from the naturalization clause, Act I, § 8, cl. 4, and also authority [12] deriving from implied powers of Congress.[13] In any event, however, the recognition or grant of U.S. citizenship is lawful only because this is within the power of Congress under the Constitution.

We see no basis for concluding that the Supreme Court was declaring a due process protection to citizenship granted by a naturalization act that did not extend to citizenship granted by another act.[14]

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[12] What appears to be the earliest ancestor of section 301(a) is the Act of March 26, 1790, 1 stat. 103, 104, which was an Act to establish a uniform rule of naturalization. *See* n. 16, infra.

[13] Article I, § 8 authorizes Congress "to establish a uniform Rule of Naturalization." We need not here decide whether there exists an implied power in foreign relations that would justify legislation like that before us. *See* Henkin, The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations, 107 U. Pa. L. Rev. 903 (1959). Other possibilities exist for justifying congressional legislation to define citizenship. The term "naturalization" appears in the text of the Constitution without definition. The need for explication may well serve to sustain legislation. *Compare* Katzenbach v. Morgan, 384 U.S. 641 (1966).

[14] We do not think a contrary view was intended by Justice Black's majority opinion in *Afroyim*, that

> the [Fourteenth] Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit. 387 U.S. at 262.

*See also* Justice Warren's dissent in Perez v. Brownell:

> The Government is without power to take citizenship away from a native-born or lawfully naturalized American. The Fourteenth Amendment recognizes that this

The Government argues in the alternative that even if congressional power to enact conditions on citizenship is limited by due process, section 301(b) contains reasonable conditions and is, therefore, constitutional. It is urged that section 301(b) is simply a reasonable way of assuring that children of hybrid origin give some affirmative indication of desiring to be part of our society as well as avail themselves of our protection and the opportunity to come to this country whenever it proves expedient.[15] Our attention is directed to the background and legislative history of section 301 which, according to the Government, reveals that the purpose of subsection (b) of § 301 is to assure that these children of mixed allegiance have some

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priceless right is immune from the exercise of arbitrary governmental powers.

356 U.S. at 77–78.

It is hardly consistent with the farreaching holding of *Afroyim* to attribute to Justice Black's language an intention to leave unprotected a broad class of citizens. The holding is cast in broad terms and draws no distinction among types of citizenship. *See* Afroyim v. Rusk, 387 U.S. at 267–68. Moreover, there is no reason to believe that Justice Black meant to vary settled doctrine that due process protects persons.

[15] *Compare* Perkins v. Elg, 307 U.S. 325 (1939), approving by implication an election requirement for persons who bear dual citizenship; *see also* Savorgnan v. United States, 338 U.S. 491 (1950), holding that voluntary naturalization in a foreign state is a valid basis for expatriating an American citizen, even though there was no desire or intention or awareness that the act of naturalization would operate to divest citizenship. For a discussion of problems arising out of dual nationality, *see generally* Scharf, A Study of the Law of Expatriation, 38 St. Johns L. Rev. 251, 271–75 (1964).

connection to the state that is offering them its protection and other benefits of citizenship.[16]

The Government's contention is not without appeal, and we have pondered the matter carefully. There is an undeniable danger that children, born and raised abroad, in a foreign home, where English may never

[16] Section 301 can be traced to early legislation, dating back to the infancy of the Republic. As early as 1790 Congress provided for the transmission of citizenship by descent. The first such statute was framed as a limitation. "[T]he right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Section 1, Act of March 26, 1790, 1 Stat. 103, 104. That section was reenacted and finally codified as § 1993 of Revised Statutes. The 1855 Act was a response to an 1854 article, criticizing the earlier formulations for not providing citizenship for those children of American paternity who were born abroad. *See* Binney, 2 Amer. Law Reg. 193; *see also* 2 Kent Commentaries 14. In 1934 Congress eliminated the obvious inequity of extending the benefit of citizenship to only those children with paternal ties to the United States. *See* 78 Cong. Rec. 7344 (73rd Cong., 2d Sess.). At this juncture Congress also included the five years presence requirement which is now section (b) of the statute. Sec. 1, Act of May 24, 1934, 48 Stat. 797.

The forerunner of subsection (b) was Section 6, Act of March 12, 1907, 34 Stat. 1228–29, which provided:

> That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

be spoken, schooled where English is not taught, celebrating foreign holidays with the family of the non-American parent, will have no meaningful connection with the United States, its culture or heritage. It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States.[17] We hold only that Congress may not proceed by granting citizenship, and then either qualifying the grant by creating a second class citizenship or terminating the grant.[18] The broad teaching of *Afroyim* and *Schneider* is that once American citizenship has been recognized or

[17] We recognize that "jus sanguinis" may provide a tenuous link to the national state when citizenship is conferred by virtue of the citizenship of only one parent. Yet we are not confronted with the specter of generations of child emigres who will return to this country to claim citizenship. Section 301(a)(7) itself requires that a parent have lived in the United States ten years as a prerequisite to transmitting citizenship to a foreign-born child.

[18] After argument was heard in this case the Attorney General promulgated a Department ruling setting forth the procedure that would be followed in expatriation cases after Afroyim v. Rusk. The gist of the memorandum is that each case will be taken on an individual basis to ascertain whether the individual involved actually intended to relinquish his American citizenship, assuming he puts the question of intent at issue. Since the new procedure "does not necessarily apply to the loss of U.S. citizenship acquired as a result of birth abroad to a citizen parent or parents," we have no occasion to consider the legal significance or soundness of the Department ruling, which appears at 34 Fed. Reg. 1079 (January 23, 1969).

conferred, Congress may not remove the status; it is for the citizen to abandon his citizenship voluntarily.

*Plaintiff's motion for summary judgment is granted: Defendant's cross-motion is denied.*

s/ J. Skelly Wright,
J. SKELLY WRIGHT,
*United States Circuit Judge.*

s/ Harold Leventhal,
HAROLD LEVENTHAL,
*United States Circuit Judge.*

s/ John Lewis Smith, Jr.,
JOHN LEWIS SMITH, Jr.,
*United States District Judge.*

WASHINGTON, D.C.,
*February 28, 1969.*

LEVENTHAL, *Circuit Judge,* concurring. I add to the opinion I have written for the court a few words that help me place this case in perspective.

We did not have before us in this case a statute that set conditions as a prerequisite for the grant of citizenship. Therefore we did not have occasion to consider to what extent Congress could impose such conditions and what kind of conditions, if any, it could impose. My own assumption is that Congress can impose reasonable conditions that must be met before citizenship is recognized.[1] But that is not the course that Congress wanted to follow here. It wanted the

[1] While Congress would have wide latitude in drafting a condition precedent to its grant of citizenship, such conditions would have to comply with the fundamental requirements of equal protection and due process. *Compare* French, Unconstitutional Conditions: An Analysis, 50 Geo. L. J. 234 (1961).

child beneficiary governed by § 301(a)(7) to be a citizen at birth, with advantages of United States diplomatic protection and other benefits of citizenship, and perhaps with the corollary opportunity to resist citizenship claims of other countries.[2]

Nor were we required to consider a statute in which residence abroad was not established as an operative fact terminating citizenship, but was given significance only as an evidentiary fact indicative of a voluntary relinquishment of citizenship.[3]

s/ Harold Leventhal,
HAROLD LEVENTHAL,
*United States Circuit Judge.*

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[2] *See* Borchard, Diplomatic Protection of Citizens Abroad § 200, at 462.

[3] *Compare* Chief Justice Warren's dissent in Perez v. Brownell, which states that "certain voluntary conduct results in an impairment of the status of citizenship," 356 U.S. at 69, and that "United States citizenship can be abandoned, temporarily or permanently, by conduct showing a voluntary transfer of allegiance to another country." 356 U.S. at 73; *compare also* Justice Black's concurring opinion in Nishikawa v. Dulles, 356 U.S. 129, 139 (1958), where he noted, "Although Congress may provide rules of evidence for [determining when there has been voluntary relinquishment], it cannot declare that such equivocal acts as service in a foreign army, participation in a foreign election or desertion from our armed forces, establishes a conclusive presumption of intention to throw off American nationality. [Citation omitted.] Of course such conduct may be highly persuasive evidence in the particular case of a purpose to abandon citizenship."

JUDGMENT

Bellei v. Rusk, Secretary of States [*sic*]
Civ. Act. 3002–67

In accordance with our memorandum opinion and order of February 28, 1969, it is hereby adjudged, declared, and decreed:

(1) That Section 301(b) of the Immigration and Naturalization Act, 8 U.S.C. § 1401(b), is unconstitutional; and,

(2) That plaintiff is a citizen of the United States and is entitled to all the rights and privileges appertaining to a citizen of the United States.

s/J. Skelly Wright
J. SKELLY WRIGHT,
*United States Circuit Judge.*

s/Harold Leventhal
HAROLD LEVENTHAL,
*United States Circuit Judge.*

s/John Lewis Smith, Jr.
JOHN LEWIS SMITH, Jr.,
*United States District Judge.*

WASHINGTON, D.C.

*May 22, 1969.*

U.S. GOVERNMENT PRINTING OFFICE : 1969

IN THE

# Supreme Court of the United States

**October Term, 1968**

No. [redacted] 24

WILLIAM P. ROGERS, Secretary of State,
*Appellant,*

*v.*

ALDO MARIO BELLEI,
*Appellee.*

## APPELLEE'S MOTION TO AFFIRM

O. JOHN ROGGE
1501 Broadway
New York, New York 10036

*Attorney for Appellee*

IN THE

# Supreme Court of the United States

**October Term, 1968**

**No. 1463**

WILLIAM P. ROGERS, Secretary of State,
*Appellant,*

*v.*

ALDO MARIO BELLEI,
*Appellee.*

## APPELLEE'S MOTION TO AFFIRM

The appellee, Aldo Mario Bellei, moves under Rule 16 of the Revised Rules of the Court that the judgment of the federal three-judge court below be affirmed on the ground that it is manifest that the question on which the decision of this cause depends is governed by the Court's decisions in *Schneider* v. *Rusk,* 377 U.S. 163 (1964), and *Afroyim* v. *Rusk,* 387 U.S. 253 (1967).

### Question Presented

Can the Congress, consistent with the due process clause of the Fifth Amendment, withdraw United States citizenship, acquired at birth, absent a voluntary renunciation?

## Statement of the Case

The appellee, Aldo Mario Bellei, like his mother, has always valued his United States citizenship. He prizes it now. He has always wanted to have his United States citizenship. He wishes to have it now.

On four of the five times that he came to this country he travelled on a United States passport. The fifth time he wanted to do so, but our State Department would not permit it. That was the time he came here with his bride on their honeymoon to visit his grandparents on his mother's side.

Moreover, the appellee has never done anything to jeopardize his United States citizenship. He has at no time served in the military forces of Italy or any foreign country. He has never voted in any election in Italy or in any other foreign country. At the time that our State Department advised him that he no longer held American nationality, he was working for an organization engaged in the NATO defense program.

The federal three-judge district court below succinctly stated the facts in one paragraph of its opinion:

> Plaintiff, from birth, has been treated as an American citizen by the United States Government. He has been welcomed to this country without visas or other immigration papers required of foreigners. He has availed himself of his unlimited access to come to this country on several occasions and to visit with his mother's family. Plaintiff has also traveled at all times under American diplomatic protection. On his

first two visits Bellei traveled on his mother's American passport. On the last two occasions when plaintiff visited the United States, he journeyed under his own American passport, which had been issued in 1952 and periodically renewed until 1964. He was subject to the military service laws and he registered for the draft in 1960.[3]

3. His scheduled induction in 1963 was deferred because of his employment with a NATO defense program.

396 F. Supp. at 1248.

The appellee was born at Ancona, Italy, on December 22, 1939. His mother, Theresa Lola Bellei, nee Cesaretti, was born in Philadelphia, Pennsylvania, on March 14, 1915 and resided in the United States until March 23, 1939. When she was 24 years old, she went to Italy to live with her husband, whom she had married in Philadelphia, Pennsylvania, on March 14, 1939. At the time of appellee's birth his mother was, and always has been a citizen of the United States.

The appellee was physically present in the United States from April 27, 1948 to July 31, 1948, from July 10, 1951 to October 5, 1951, from June of 1955 until October of 1955, from December 18, 1962 to February 13, 1963, and from May 26, 1965 to June 13, 1965. On the first two such occasions the appellee came to the United States on his mother's passport. She was in possession of a United States passport, and was admitted to the United States with her children as citizens of this country. On the next two such occasions, he came to the United States on his own United States passport, and was admitted to the United States as a citizen of this country.

For nearly a dozen years, from 1952 to 1964, the appellee as a United States citizen had his own United States passport. He was first issued his own United States passport on June 27, 1952. Thereafter his passport was periodically renewed.

On March 28, 1960 the appellee registered under the Selective Service laws of the United States with the American Consul in Rome, Italy. He was asked to report for a physical examination and passed such examination by the U.S. Army at Leghorn, Italy. On December 11, 1963 he was asked to report for induction at Washington, D.C., but his induction was deferred because he was employed on a NATO defense program. After February 14, 1964 he received a letter from the United States Selective Service explaining that due to loss of his United States citizenship he had no further obligations for military service on behalf of the United States.

**The question on which the decision of the cause depends is governed by the court's holdings in *Schneider* v. *Rusk*, 377 U.S. 163 (1964), and *Afroyim* v. *Rusk*, 387 U.S. 253 (1967).**

With the exception of *Perez* v. *Brownell*, 356 U.S. 44 (1958), which the Court overruled in *Afroyim* v. *Rusk*, 387 U.S. 253 (1967), the Court has consistently invalidated statutory provisions for involuntary expatriation. *Afroyim* v. *Rusk*, 387 U.S. 253 (1967); *Schneider* v. *Rusk*, 377 U.S. 163 (1964); *cf. Perkins* v. *Elg*, 307 U.S. 325 (1939). As the court below stated:

> Plaintiff contends that section 301(b) operates to strip a citizen of his citizenship and rests his case

> primarily on the pillar of due process which has become a bulwark for the protection of citizenship in recent Supreme Court decisions. See Afroyim v. Rusk, 387 U.S. 253, 87 S.Ct. 1660, 18 L.Ed. 2d 757 (1967); Schneider v. Rusk, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed. 2d 218 (1964). While the facts of both cases are distinguishable, we think the *Afroyim* and *Schneider* opinions do stand for the proposition that in the absence of fraud Congress may not withdraw a citizenship, whether acquired at birth or by subsequent grant, that is not voluntarily renounced. * * *

296 F.Supp. at 1249.

The appellant would like to distinguish between United States citizenship based on a Congressional grant and that based on the Fourteenth Amendment (Jurisdictional Statement, pp. 8-9). But in *Schneider* v. *Rusk*, 377 U.S. 163 (1963), Angelika Schneider received her derivative United States citizenship through her mother by statute. She was just as much a statutory citizen as Aldo Mario Bellei is.

## Conclusion

**The Court should affirm the judgment of the federal three-judge district court below on the basis of *Schneider* v. *Rusk*, 377 U.S. 163 (1964), and *Afroyim* v. *Rusk*, 387 U.S. 253 (1967).**

Respectfully submitted,

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*Attorney for Appellee*

# INDEX





369-730—69——1

CITATIONS

Cases:

Miscellaneous—Continued

# In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 179

WILLIAM P. ROGERS, SECRETARY OF STATE, APPELLANT

*v.*

ALDO MARIO BELLEI

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA*

## BRIEF FOR APPELLANT

### OPINIONS BELOW

The opinions of the district court granting appellee's motion for summary judgment (A. 15–26) are reported at 296 F. Supp. 1247.

### JURISDICTION

On May 22, 1969, a three-judge district court, convened pursuant to 28 U.S.C. 2282, entered its judgment (A. 27) declaring that Section 301(b) of the Immigration and Nationality Act, 8 U.S.C. 1401(b), is unconstitutional. A notice of appeal was filed in the district court on May 23, 1969, and probable jurisdiction was noted October 13, 1969. Jurisdiction over this direct appeal is conferred by 28 U.S.C. 1252 and 1253.

## QUESTION PRESENTED

Whether either the Due Process Clause of the Fifth Amendment or the Citizenship Clause of the Fourteenth Amendment deprives Congress of the power to attach to the statutory grant of citizenship to a person born abroad of one citizen-parent the condition subsequent that, in order to retain such citizenship, he must come to this country and live here for five years before attaining the age of twenty-eight.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent Constitutional and statutory provisions are set forth in Appendix A, *infra* pp. 43–46.

## STATEMENT

Appellee filed this action seeking declaratory and injunctive relief against the operation of Section 301(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1401(b), on the ground that the section's provision for loss of citizenship is unconstitutional.[1] The facts were stipulated, and the properly convened three-judge district court granted appellee's motion for summary judgment, holding the statute void and confirming his continued American citizenship.

1. Appellee's father has always been a citizen of Italy and has never acquired United States citizenship. His mother was born in the United States and has always

[1] The action was originally filed in the United States District Court for the Southern District of New York, but because venue was not proper there, see 28 U.S.C. 1391(e), the suit was transferred to the District Court for the District of Columbia pursuant to 28 U.S.C. 1406(a).

been, by American law, an American citizen. A few days after his parents' marriage in the United States on March 14, 1939, they left for Italy, where appellee was born on December 22, 1939. The family has since resided there.[2]

At the time of his birth in Italy appellee became, and still is, a citizen of Italy. Under the terms of Section 1993 of the Revised Statutes, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797, he also acquired United States citizenship at his birth abroad to an American citizen. That statute also then provided that in order to retain the United States citizenship acquired under such circumstances, appellee had to come to the United States and reside here for at least five years immediately prior to his eighteenth birthday and take an oath of allegiance to the United States after he reached the age of twenty-one. These requirements were liberalized somewhat by the Nationality Act of 1940 (Section 201(g), 54 Stat. 1139), and were further relaxed by Section 301(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1401(b), which provides that a person born abroad to one American parent after May 24, 1934 (see Section 301(c)), may retain his citizenship by residing in the United States for five continuous years sometime between his fourteenth and twenty-eighth birthdays.[3]

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[2] The facts summarized in the above paragraph and in the three succeeding paragraphs appear in the Stipulation of Facts, agreed to by the parties, which is set forth at A. 5–12.

[3] Absences from the country for an aggregate of less than twelve months do not break the continuity of the five-year residence required. See Section 301(b), Immigration and Nationality Act, as amended, 8 U.S.C. 1401b.

369-730—69——2

2. For most of his life appellee has lived in Italy, the country of his birth. Recently he took up residence in England. Although he has come to the United States on five brief visits, appellee has never established residence in this country. Therefore he admittedly failed to comply with the conditions for retention of his American citizenship as prescribed in the 1934 Act which conferred American citizenship on him, or with the more generous provisions of subsequent statutes.

On his first two trips to the United States, in 1948 and 1951, appellee traveled on his mother's American passport. On his next trips in 1955 and 1962, he traveled on his own United States passport, which was periodically renewed until December 22, 1962, his twenty-third birthday. In connection with the last two renewals of his passport, he was expressly advised of the need to establish residence in the United States prior to his twenty-third birthday if he wished to retain his United States citizenship. When he failed to do so, the Department of State notified him that he had lost his United States citizenship. Appellee used his Italian passport in 1965, when he was admitted to the United States as an alien visitor.

3. In this suit appellee contended that the conditions for retention of his citizenship prescribed by Section 301(b) of the Immigration and Nationality Act are unconstitutional, and therefore that he had not lost his citizenship. On February 28, 1969, a three-judge district court granted appellee's motion for summary judgment, finding Section 301(b) invalid under the authority of *Afroyim* v. *Rusk*, 387 U.S. 253, and *Schneider* v. *Rusk*, 377 U.S. 163.

## SUMMARY OF ARGUMENT

### I

The court below was mistaken in its reliance on *Afroyim* v. *Rusk*, 387 U.S. 253. *Afroyim* found that citizenship status established under the Fourteenth Amendment is protected by that Amendment unless it is voluntarily relinquished by the citizen. Since appellee was not "born or naturalized in the United States" his status is not dealt with in the Fourteenth Amendment, but depends entirely on Congressional grant. As this Court noted in *United States* v. *Wong Kim Ark*, 169 U.S. 649, 688, the Fourteenth Amendment "has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it always has been, by Congress * * *." Moreover, *Schneider* v. *Rusk*, 377 U.S. 163, prohibited only arbitrary or discriminatory termination of citizenship status. It did not preclude the imposition of reasonable conditions, in situations not governed by the Fourteenth Amendment.

As this Court pointed out in *Montana* v. *Kennedy*, 366 U.S. 308, 312, children born abroad to American parents have no constitutional claim to citizenship, since the legislative dispensation is "the sole source of inherited citizenship." Congress unquestionably can impose conditions limiting the transmission of citizenship to children born abroad. Thus, our statutes have always prescribed conditions precedent, limiting the right to transmit citizenship to

parents who have previously resided in the United States. Similarily, Congress could have deferred the vesting of citizenship for appellee until he established residence in the United States. The Congressional power is not lessened by Congress' generosity in granting citizenship benefits to such a child from birth upon condition that he shall retain such citizenship only if he establishes residence in the United States at maturity.

## II.

The supposition that the rights of citizenship cannot be limited in any way is erroneous. Thus a foreign born citizen cannot transmit citizenship to his children unless he establishes residence in the United States. Moreover, citizenship through naturalization can subsequently be rescinded if it was obtained through fraud.

The requirement that a dual national born abroad must demonstrate his election of United States citizenship by residence in this country is reasonable. The legislative history of the 1934 legislation that first gave American mothers equal right with American fathers to transmit citizenship and also imposed residence requirements upon children thus receiving citizenship reflects reasonable apprehension that a child born abroad to an American mother and an alien father could be reared in an alien environment and might actually have no loyalty or attachment to the United States. Residence has generally been a criterion of allegiance, and is for example, a requirement for naturalization. The requirement that foreign born dual nationals must make an election by establishing

residence in the parent country is endorsed by scholarly opinion and by the laws of many countries, and even the court below conceded its reasonableness.

Appellee is a person of dual nationality who has deliberately failed to comply with the conditions prescribed by Congress for retention of his citizenship. There is no requirement that he be permitted to keep two citizenships, using each when it serves his purpose. Indeed, in failing to make the required election of United States citizenship after maturity, petitioner may have voluntarily relinquished or abandoned such citizenship within the concepts expressed in *Afroyim* v. *Rusk, supra.* However, it is unnecessary to resolve that question, since this case does not involve Fourteenth Amendment citizenship and therefore petitioner can be held to compliance with the reasonable condition imposed by Congress in granting him citizenship.

## ARGUMENT

### I. SINCE APPELLEE WAS NOT BORN OR NATURALIZED IN THE UNITED STATES, HIS CITIZENSHIP IS GOVERNED NOT BY THE FOURTEENTH AMENDMENT BUT BY A STATUTORY GRANT THAT CAN BE SUBJECTED TO REASONABLE CONDITIONS

#### A. THIS CASE IS NOT GOVERNED BY *AFROYIM* V. *RUSK* OR *SCHNEIDER* V. *RUSK*

In striking down Section 301(b) of the Immigration and Nationality Act, 8 U.S.C. 1401(b), the court below relied primarily on this Court's decision in *Afroyim* v. *Rusk,* 387 U.S. 253. The court considered that *Afroyim* precluded the imposition of any conditions restricting the retention of citizenship, however reasonable they might be and regardless of the manner in which that citizenship was obtained. We submit that this view mis-

reads *Afroyim*, and misconceives the nature and limitations of Congressional power in legislating for the acquisition of United States citizenship by persons born abroad to United States citizen parents.[4]

The basic premise of *Afroyim* was that citizenship sheltered by the Fourteenth Amendment is protected against "forcible destruction" by the government (387 U.S. at 268), and is retained unless the citizen voluntarily relinquishes it. The relevant provision of the Fourteenth Amendment is its first sentence (the Citizenship Clause), which declares that "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States * * * ." Afroyim had acquired citizenship through naturalization, and the Court defined the issue before it as

> whether Congress can consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up. [387 U.S. at 256.]

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[4] The Department of State has found that 661 persons lost their United States citizenship under Section 301(b) during fiscal years 1964–1968. The Immigration and Naturalization Service has under consideration about 25 cases in which possible loss of United States citizenship under that section is involved. The Department of State estimates that several hundred such cases are pending throughout the world in the various consular offices of the United States. This issue is also in litigation in *Vincente Gonzalez-Gomez* v. *Immigration and Naturalization Service*, E.D. Calif., Civ. No. F–151, where the court on June 17, 1969, upheld the constitutionality of the statute, disagreeing with the court below. Its brief opinion, as yet unreported, is reproduced as Appendix B, *infra*, pp. 47–49. We are informed that plaintiff in that case is appealing and will submit an *amicus* brief herein.

The Court resolved this question by explaining that

> [t]he Amendment can most reasonably be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, *this Fourteenth Amendment citizenship* was not to be shifted, canceled, or diluted at the will of the Federal Government, the States, or any other governmental unit. [387 U.S. at 262; emphasis added.]

Throughout its opinion in *Afroyim* the Court emphasized that it was dealing with Fourteenth Amendment citizenship and enforcing the safeguards found in the Citizenship Clause. 387 U.S. at 262, 263, 268.

Appellee was not "born or naturalized in the United States" and thus his citizenship status is not within the ambit of the Fourteenth Amendment. Since he acquired citizenship at birth outside the United States his status is dependent entirely on Congressional grant. As we shall show, such legislation, conferring citizenship benefits on children born abroad to American citizens, long antedated the Fourteenth Amendment. It seems obvious from its language and purpose that the Fourteenth Amendment was not designed to interfere with such legislative grants of citizenship. As the Court explained in *United States* v. *Wong Kim Ark,* 169 U.S. 649, 688:

> This sentence [the Citizenship Clause] of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed—"born in the United States," "naturalized in the United States", and "subject to the jurisdiction thereof"—in short, as to everything relating to

> the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it always has been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.

While recognizing that there may be more than one Constitutional source for citizenship rights, the court below erroneously read *Afroyim* as establishing a pervasive "due process protection to citizenship". 296 F. Supp. at 1251. There is no mention of due process in *Afroyim*, and this Court manifestly did not desire to rest its decision on due process requirements.[5]

We doubt also the lower court's assumption that Section 301(b) is an expatriation statute. *Afroyim* was expressly concerned with the power of Congress to "expatriate" American citizens against their will. Section 301(b), in common with like provisions of earlier statutes, appears in the portion of the Act dealing with the *acquisition* of citizenship, while the expatriation provisions, relating to citizenship acquired by birth or naturalization, appear in the portion of the Act beginning with Section 349, 8 U.S.C. 1481. Congress evi-

[5] In response to requests by the Department of State and the Immigration and Naturalization Service for guidelines to be followed in light of *Afroyim*, the Attorney General on January 18, 1969, issued a Statement of Interpretation which was expressly made inapplicable to loss of citizenship under Section 301(b), here involved. 34 Fed. Reg. 1079. The Statement also notes that the "ultimate determination" of the effect of the broad language in *Afroyim* must be left to the courts.

dently did not regard Section 301(b) as concerned with expatriation. The conditions for retention of citizenship in Section 301(b) are included in the original grant of such citizenship by Congress, and are prescribed as an inherent segment of the grant. We do not agree that requiring fulfillment of the condition originally prescribed by Congress is a "forcible destruction" of a constitutionally protected citizenship. And we question whether appellee can claim the citizenship granted by Congress while repudiating the conditions specified in the grant.

The court below was also wrong in finding that *Schneider* v. *Rusk*, 377 U.S. 163, forbade any impairment of citizenship status once it has attached. In that case the court struck down the provisions under which a naturalized citizen lost her citizenship by continuous residence for three years in her country of origin. The Court held that the Due Process Clause of the Fifth Amendment prohibited *unreasonable* discrimination against naturalized citizens denying them equal protection with the native born. But *Schneider* did not outlaw reasonable conditions imposed in situations not governed by the Fourteenth Amendment.

B. THE RIGHT TO ACQUIRE UNITED STATES CITIZENSHIP AT BIRTH ABROAD IS ENTIRELY STATUTORY

Legislation authorizing citizenship benefits for children born abroad stems from ancient antecedents. The original rule of the common law was the *jus soli*, under which the law of the place of birth governed citizenship status.[6] The decline of feudalism and the

[6] See Cockburn, *Nationality*, p. 7; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 668–71.

developing needs of foreign commerce and intercourse, with the resultant increase in the mobility of British subjects, eventually led to the enactment of statutes, commencing in 1350, bestowing British nationality on children born abroad to natural born British subjects.[7] British law thus developed a combination of the unwritten *jus soli* and the statutory *jus sanguinis*,[8] a civil law concept, followed in most European countries, under which the nationality of the parents is transmitted by descent to their child at the moment of birth.

The development of the applicable rules in this country reflected the British experience.[9] As originally adopted, the Constitution did not define American citizenship. Various Constitutional provisions spoke, however, of citizenship in general terms,[10] and Article I, Sec. 8, cl. 4 empowered Congress to establish a uniform rule of naturalization. The failure to define citizenship may have been attributable to a desire to avoid troublesome problems, such as the relationship between State and national citizenship and the status of the Negro slaves.[11]

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[7] *Id.*; *Weedin* v. *Chin Bow*, 274 U.S. 657, 660, 668.

[8] *Id.*

[9] For general discussions of this development in the United States see *United States* v. *Wong Kim Ark*, *supra*; *Weedin* v. *Chin Bow*, *supra*; Van Dyne, *Citizenship of the United States*, 32–33.

[10] U.S. Const., Art. II, Sec. 1, cl. 5 (eligibility for Presidency—natural born citizen); Art. I, Sec. 2, cl. 2 (qualifications for members of House of Representatives—citizen of the United States); Art. III, Sec. 2, cl. 1 (Judicial power extends to controversies involving citizens of different States); Art. I, Sec. 3, cl. 3 (qualifications for Senators—citizens of the United States).

[11] See Roche, *The Expatriation Cases*, The Supreme Court Review, 325, 328 (U. of Chicago, 1963); Gordon, *The Citizen and the State*, 53 Georgetown Law Journ. 315, 318, 334 (1965).

In any event, it seems clear that the framers referred to "citizens" in the contemporary usage, primarily based on the experience of the mother country.[12]

The First Congress quickly acted to clarify citizenship status in several respects in the Act of March 26, 1790, 1 Stat. 103. Early in the consideration of this measure Mr. Burke observed that "The case of children of American parents born abroad ought to be provided for, as was done in the case of English parents in the 12th year of William III".[13] The 1790 Act provided for the acquisition of American citizenship by children born abroad to American fathers, and similar provisions have been made in the various subsequent citizenship laws, including the present statute.[14]

Until the Civil Rights Act of 1866, 14 Stat. 27, there was no statute defining the citizenship status of those born in the United States. It is now clear that the traditional rule of the *jus soli* prevailed, as a heritage from the English common law. The rule of *jus soli* was incorporated in the Fourteenth Amendment, primarily to safeguard the status of the newly emancipated Negroes. See *Afroyim* v. *Rusk,* 387 U.S. 253, 262. As the Court pointed out in *United States* v. *Wong Kim Ark,* 169

[12] See *United States* v. *Wong Kim Ark*, *supra*, 169 U.S. at 654; *Lynch* v. *Clarke*, 1 Sandf. Ch. 583, 645–652 (N.Y. 1844); *Ludlam* v. *Ludlam*, 26 N.Y. 356, 361 (1863).

[13] Annals of First Congress, p. 1121. See also *Weedin* v. *Chin Bow*, *supra*, 274 U.S. at 661.

[14] See 3 Hackworth, *Digest of Int. Law*, 17. The ancestor British statutes included similar reservations, limiting to the grandchildren of natural born British subjects the right to inherit British citizenship. See *Weedin* v. *Chin Bow*, 274 U.S. 657, 661; *United States* v. *Wong Kim Ark*, 169 U.S. 649, 668–671; Dicey, *Conflict of Laws* (1st Ed.) 177; Cockburn, *Nationality* 6. Congress was aware of the British practice but, because of concern with divided alle-

U.S. 649, 688, the first sentence of the Fourteenth Amendment

> is declaratory of existing rights, and affirmative of existing law * * *. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated as it has always been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization.

As explained by the Court in *Wong Kim Ark*, the supplementary rule of *jus sanguinis*—citizenship by descent or inheritance—was dependent entirely on statutes, which "applied only to cases coming within their purport" (169 U.S. at 668). Like its British ancestor, the citizenship law of the United States after the adoption of the Fourteenth Amendment was, and still is, a combination of the *jus soli* (Constitutional) and the *jus sanguinis* (statutory). A similar combination prevails in most countries of the world.[15]

The source of Congressional authority to legislate for citizenship by descent is not clearly identified. In *Wong Kim Ark, supra*, 169 U.S. at 688, this Court suggested that the authority derived from the constitutional power (Article I, Section 8, cl. 4) to establish a uniform rule of naturalization.[16] Another plaus-

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giance, "was not willing to make so liberal a provision". *Weedin* v. *Chin Bow*, *supra*, at 665.

[15] See *Research in International Law*, Harv. Law School (hereafter *Harvard Research*), 23 Am. Journ. Int. Law (Special Supplement) 30–32, 41–44 (1929).

[16] The difficulty with this theory is the conception, generally recognized in modern usage, that naturalization is the acquisition of citizenship *after birth*. See 8 U.S.C. 1101(a)(23); Section 101(c), Nationality Act of 1940, 54 Stat. 1137. The present statute spells out three major methods for acquiring

ible suggestion, mentioned by the court below (A. 22 n. 13), is that this legislation is a proper definition by Congress of undefined terms in the Constitution, such as "citizen" and "naturalization". A third possibility is that it is an expression of the inherent power of a state to define its citizenship. See *Minor* v. *Happersett,* 88 21 Wall. 162, 167; *Mackenzie* v. *Hare,* 239 U.S. 299, 310–12. But there is no need to choose among these various theories, since it is in any event undisputed that Congress is empowered to define the citizenship status of foreign born children of American citizens.

C. CONGRESS HAS POWER TO PRESCRIBE REASONABLE CONDITIONS FOR THE ACQUISITION AND RETENTION OF CITIZENSHIP BY CHILDREN BORN ABROAD

It is clear that Congress is under no Constitutional compulsion to grant citizenship to foreign-born children, but has plenary authority to grant or withhold citizenship, or to subject it to reasonable terms. As this Court pointed out in *Montana* v. *Kennedy,* 366 U.S. 308, 312, any citizenship claim in such cases depends on "the structure of inherited citizenship that Congress created", which is "the sole source of inherited citizenship".

There are at least two solidly endorsed historical precedents for shutting off an American citizen's capacity to transmit citizenship by descent. The first of these occurred in Section 4 of the Act of April 14, 1802, 2 Stat. 153, 155, which recognized the transmission of citizenship by descent only through "per-

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United States citizenship: (1) at birth in the United States; (2) at birth outside the United States; (3) by naturalization. See 8 U.S.C. 1401, 1421.

sons who now are, or have been citizens of the United States".[17] In 1854 Mr. Horace Binney, a distinguished legal scholar, wrote an article contending that because of this statutory language persons who had acquired United States citizenship after April 14, 1802, did not transmit citizenship by descent to their children born abroad. 2 Amer. Law Reg. 193.[18] Congress quickly remedied this omission by the Act of February 10, 1855, 10 Stat. 604, which confirmed the citizenship status of children "heretofore born, or hereafter to be born," abroad to American fathers. The importance in the present context of Mr. Binney's hypothesis is that on three occasions this Court has referred with approval to its recognition that during a period of over 50 years there was no provision for the transmission of citizenship by descent. See *United States* v. *Wong Kim Ark,* 169 U.S. 649, 673–674; *Weedin* v. *Chin Bow,* 274 U.S. 657, 663; *Montana* v. *Kennedy,* 366 U.S. 308, 311.

Another example of Congressional power over citizenship by descent was the restriction of such opportunity, until recently, to the children of American fathers. Section 1 of the Act of May 24, 1934, 48 Stat. 797, first gave American citizen mothers the right to transmit citizenship to children thereafter born. In *Montana* v. *Kennedy,* 366 U.S. 308, a person born in Italy in 1906 to an American mother and an Italian father temporarily sojourning in Italy was held not to have acquired American citizenship, even though he

[17] Sec. 4, Act of April 14, 1802, 2 Stat. 153, 155.

[18] The same hypothesis had previously been urged in 2 Kent, *Commentaries* 52. Mr. Binney did not sign the article in the American Law Register. It was later published as a separate pamphlet under the author's name.

had been brought to the United States by his parents immediately after birth and had thereafter resided in the United States. Again this Court expressed no doubt about the authority of Congress to limit the transmission of citizenship by descent, pursuant to

> * * * the structure of inherited citizenship that Congress created in 1855 and recognized and reaffirmed until 1934. On this basis and in the light of our precedents, we hold that at the time of petitioner's birth in 1906, R.S. § 1993 provided *the sole source of inherited citizenship status* for foreign-born children of American parents. That statute cannot avail this petitioner, who is the foreign-born child of an alien father. [366 U.S. at 312; emphasis added.]

The power of Congress to limit its bounty is unimpaired even if the statutes dealing with citizenship by descent are deemed naturalization statutes within the meaning of the Constitution. No one has a right to be naturalized unless he satisfies the conditions prescribed by Congress. *United States* v. *Ness,* 245 U.S. 319; *United States* v. *Ginsberg,* 243 U.S. 472; *Maney* v. *United States,* 278 U.S. 17. In the ordinary naturalization proceeding these conditions include prescribed periods of residence, good moral character, and attachment to the principles of the Constitution. *E.g.,* Sec. 316(a), Immigration and Nationality Act, 8 U.S.C. 1427(a). Similar requirements to assure that the foreign-born child of an American parent has appropriate identification with the United States are equally valid. See *Weedin* v. *Chin Bow,* 274 U.S. 657, endorsing the requirement of prior residence in the United States by the citizen parent as a condition precedent to the transmission of citizenship.

Congress unquestionably could have established the condition precedent that a child born abroad to an American parent may not acquire United States citizenship until he has satisfied a reasonable residence requirement. Such a delay in conferring citizenship is prescribed by the laws of many other countries,[19] and was actually suggested by the 1934 Act's declaration that "the right of citizenship shall not descend" until the child establishes the requisite residence in the United States. However, the administrative reading of the 1934 Act, and the explicit language of the 1940 and 1952 Acts, have conferred citizenship at birth, subject to conditions subsequent for the retention of such citizenship. See 38 Ops. Atty. Gen. 10, 16–18; *Codification of the Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st Sess., Vol. 1, p. 9. We believe that the Congressional power was not lessened by Congress' generosity in allowing such children to enjoy citizenship benefits immediately.

If appellee had been born six years earlier he would have had no claim to American citizenship, since his mother was then incapable of transmitting it. *Montana* v. *Kennedy, supra.* Having been born after the 1934 Act, he acquired citizenship subject to the conditions

[19] Countries which provide that foreign born children acquire citizenship only if they establish residence in the parent country include Argentina, Bolivia, Brazil, Chile, Columbia, Greece, Guatemala, Honduras, Netherlands, Nepal, Nicaragua, Panama, Paraguay and Portugal. See *Laws Concerning Nationality,* U.N. Legislative Series, St/Leg/Ser. B/4; *Harvard Research,* pp. 31, 42.

for its retention fixed by Congress in the very statute from which his citizenship right emerged. It is doubtful that Congress would have chosen to extend citizenship at birth to appellee and others in his class if it was unable validly to impose the conditions which were regarded as intimate and unseverable concomitants of the grant.

The postponement of citizenship benefits for foreign born children of American parents would be inconvenient and undesirable. It is manifestly reasonable and beneficial to such children and their parents if the child is invested with the parent's citizenship immediately, subject instead to a subsequent satisfaction of reasonable requirements. We believe nothing in the Constitution or in the prior decisions of this Court demands that Congress must choose between the undesirable alternatives of conferring unconditional United States citizenship at birth on a person who may never have any contact with or allegiance to this country or deferring citizenship for such a person until he establishes such contact or allegiance.

The supposition of the court below that citizenship cannot be granted subject to any conditions overlooks at least three well established conditions to citizenship grants. In the first place, a child who acquires United States citizenship at birth abroad cannot transmit such citizenship to his descendants unless he establishes residence in the United States. In addition, this Court has declared that its decisions in the expatriation cases do not disturb the power to vitiate naturalizations obtained through fraud. See *Afroyim* v. *Rusk*, 387 U.S. 253, 267,

n. 23; *Perez* v. *Brownell,* 356 U.S. 44, 66 (dissenting opinion of Chief Justice Warren); *Schneider* v. *Rusk,* 377 U.S. 163, 166. A third example, which we shall discuss more fully, is presented by a person with dual nationality who may be required to elect between his conflicting allegiances. Concededly, conditions subsequent affecting citizenship status are unusual, but there is no basis for finding that Congress lacks the power to impose them in appropriate circumstances.

In finding that Section 301(b) is invalid under this Court's holdings in *Schneider* and *Afroyim,* the court below stated (A. 21) that

> Whatever the reason plaintiff remained abroad * * *, Congress cannot terminate his citizenship on the ground that he only enjoyed a second-class citizenship, one that restricted his right to live and work abroad in a way that other citizens may.

The court seems to have taken the sweeping view that any condition subsequent attached to a grant of citizenship creates a "second-class citizenship." We submit that the residence requirement of section 301 (b) does not create a second-class citizenship, but, instead, merely assures that the beneficiary of the citizenship status conferred by the statute will affirmatively demonstrate, in a reasonable manner, his identification with and allegiance to this country. In the words of then Representative Dirksen, discussing the 1934 amendment (see p. 31, *infra*), fulfillment of this requirement completes the "inchoate right of citizenship" which Section 301(b) bestows at a child's birth. Unlike the situation which this Court faced in *Schneider,* the provision under consideration here

does not place a permanent restriction on citizenship, but merely requires that a person make *one* showing of his attachment to this country, after which he is free to reside for the rest of his life wherever he chooses, without any threat of involuntary loss of citizenship.

Nor do we share the apparent apprehension of the court below that unless there is an absolute Constitutional preclusion of a condition subsequent appellee's citizenship status would be defenseless against arbitrary action by Congress. On the contrary, the due process mandates articulated by this Court in *Schneider* would bar any arbitrary, unreasonable, or discriminatory conditions. Conversely, due process requirements would be satisfied by reasonable conditions relating to inherited citizenship.

## II. IN REQUIRING THAT A FOREIGN BORN CHILD OF AN ALIEN FATHER AND A CITIZEN MOTHER MUST ESTABLISH RESIDENCE IN THE UNITED STATES UPON ATTAINING MATURITY CONGRESS WAS PRESCRIBING A REASONABLE CONDITION TO ASSURE PRIMARY COMMITMENT TO THE UNITED STATES BY CHILDREN OF DIVIDED ALLEGIANCE

### A. THE PROBLEM OF DUAL NATIONALITY

Because of the combination of the *jus soli* and *jus sanguinis* in the laws of most countries,[20] a child born to an American parent in a foreign country generally is invested with dual nationality.[21] This is particularly likely where, as here, the child's alien

[20] See note 15, p. 14, *supra*.

[21] See 3 Moore, *International Law Digest*, 525; Borchard, *Diplomatic Protection of Citizens Abroad*, 575.

father is a national of the country where the child was born, and the child continues to reside with his parents in that foreign country. Because such a child is born and reared with divided loyalties, a belief that his primary allegiance will be to the country of his birth is not unreasonable.

Blackstone referred to "the principle, that every man owes natural allegiance where he is born, and cannot owe two allegiances, or serve two masters at once". *Commentaries on the Law* (Dean Gavit's Edition), Book 1, Ch. 10, p. 157. It has generally been acknowledged that the dual national's ambivalent situation is unsatisfactory to the persons and nations concerned. The "entanglements which may stem from dual allegiance" were noted in *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144, 187 (Brennan, J., concurring). One recent study has recorded the "widely held opinion that dual nationality is an undesirable phenomenon detrimental both to the friendly relations between nations and the well-being of the individuals concerned". Bar-Yaacov, *Dual Nationality* 4. And in *Kawakita* v. *United States,* 343 U.S. 717, 736, this Court declared that a dual national "cannot turn it into a fair-weather citizenship, retaining it for possible contingent benefits but meanwhile playing the part of the traitor". The patent undesirability of dual nationality has led to many proposals to control it. See Bar-Yaacov, *supra,* at 5–6; *Harvard Research,* 30–32, 41–44.

The situation of the child who acquires dual nationality at birth to an American parent in a foreign

country has caused the most serious concern in this country. As we have noted, the first statute dealing with citizenship by descent, Section 1 of the Act of March 26, 1790, 1 Stat. 103, granted citizenship to children born abroad to American fathers, but specified that "the right of citizenship shall not descend to persons whose fathers have never been resident in the United States". Similar conditions were announced by the Acts of 1795,[22] 1802,[23] and 1855.[24] The 1855 Act was codified as Section 1993 of the Revised Statutes, which for many years was the basic law defining the citizenship of children born abroad to American parents. In *Weedin* v. *Chin Bow*, 274 U.S. 657, this Court ruled that under the prescription of R.S. 1993, citizenship could be transmitted to a child born abroad only if the citizen father had resided in the United States *prior to* the child's birth. See also *D'Alessio* v. *Lehmann*, 289 F. 2d 317 (C.A. 6), certiorari denied, 368 U.S. 822. The Court quoted with approval the observation in Borchard, *Diplomatic Protection of Citizens Abroad*,[25] that:

> This limitation upon the right of transmitting citizenship indefinitely was intended to prevent the residence abroad of successive generations of persons claiming the privileges of American citizenship while evading its duties.

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[22] Sec. 3, Act of January 29, 1795, 1 Stat. 414, 415.

[23] Sec. 4, Act of April 14, 1802, 2 Stat. 153, 155.

[24] Act of February 10, 1855, 10 Stat. 604.

[25] 274 U.S. at 673. Borchard referred to the similar statement in Van Dyne, *Citizenship*, 34.

It is of interest that later statutes have removed the ambiguity addressed by this Court in *Chin Bow*, and now state explicitly that the requisite residence of the parent must precede the child's birth. See Sec. 301(a)(3), (4), (5), (7), Immigration and Nationality Act, 8 U.S.C. 1401(a)(3), (4), (5), (7); Sec. 201 (c), (d), (e), (g), and (i), Nationality Act of 1940, 54 Stat. 1139, 60 Stat. 721.

B. THIS COURT HAS RECOGNIZED THAT A DUAL NATIONAL MAY CONSTITUTIONALLY BE REQUIRED TO MAKE AN ELECTION

This Court has considered problems created by dual nationality on three occasions. Since all of these cases involved dual nationals born in the United States, whose citizenship was safeguarded by the Fourteenth Amendment, they do not bear directly upon the non-constitutional citizenship considered here. Nevertheless we believe their holdings may afford some guidance.

In *Perkins* v. *Elg*, 307 U.S. 325, a native-born citizen had been taken by her parents to a foreign country, where she had acquired foreign citizenship through them by naturalization. The Court recognized (307 U.S. at 329) that she had acquired dual nationality, but that her native citizenship

> must be deemed to continue unless she has been deprived of it through operation of a treaty or congressional enactment or by her voluntary action in conformity with applicable legal principles.

Moreover, the Court found (*id.*) that a native-born citizen who had acquired dual nationality during minority would not lose his United States citizenship

> provided that on attaining majority he elects to retain that citizenship and to return to the United States to resume its duties.

In *Kawakita* v. *United States,* 343 U.S. 717, a native-born Japanese who had acquired dual nationality at birth in the United States sought to defeat a prosecution for treason by contending that he had lost his United States citizenship. This contention was rejected, and the Court stated (343 U.S. at 734):

> One who becomes a citizen of this country by reason of birth retains it, even though by the law of another country he is also a citizen of it. He can under certain circumstances be deprived of his American citizenship through the operation of a treaty or an act of Congress; he can also lose it by voluntary action.

*Mandoli* v. *Acheson,* 344 U.S. 133, also considered the situation of a native-born American who had acquired dual nationality at the time of his birth in the United States to alien parents. The Court found that there was no statute imposing upon a dual national born in the United States a duty to elect between his two nationalities, and that he had not lost his American citizenship by failure to make an election. The Court pointed out (344 U.S. at 138) that while, in the Nationality Act of 1940, Congress had enlarged the grounds for loss of nationality, "it refused to require a citizen by nativity to elect between dual citizenships upon reaching a majority."

It appears, therefore, that in its prior decisions this Court has recognized that a dual national, even though his native birth brought him within the pro-

tection of the Fourteenth Amendment, might, at Congress's direction, be required to opt for citizenship upon attaining majority. In each instance it found that no election had taken place. But in *Elg* and *Kawakita* the Court specifically noted that an election might be required by statute. And in *Mandoli* it found that there had been no loss of citizenship because no statute required a native born dual national to opt, strongly implying that an election could be required by statute. We believe it follows, *a fortiori*, that an election required by a specific statutory mandate, particularly for a foreign-born person whose citizenship claim depends entirely on statute, is both proper and valid.

C. THE STATUTORY SCHEME REFLECTS CAREFUL CONGRESSIONAL CONSIDERATION OF THE PROBLEM OF DUAL ALLEGIANCE

The laws of the United States originally did not provide for such an election. Yet problems presented by the dual nationality of foreign born citizens were a matter of constant concern for the Department of State. Even in the absence of statute, the Department of State ruled, under "an established principle of international law" that a dual national at birth abroad was subject "to the divesting of this nationality by his election, when he arrives at full age, to accept allegiance to the country of his birth". 2 Wharton, *Int. Law Digest,* 418; Van Dyne, *Citizenship of the United States,* 38; Borchard, *Diplomatic Protection of Citizens Abroad,* 575–76.

In 1906 a Citizenship Commission consisting of three State Department officers was designated to

study possible legislation "required to settle some of the embarrassing questions that arise in reference to citizenship, expatriation, and the protection of citizens abroad". H. Doc. 326, 59th Cong., 2d Sess., p. 1. The report of the Citizenship Commission contained a number of recommendations, which later were substantially adopted in the Act of March 2, 1907, 34 Stat. 1228. Section 6 of the 1907 Act provided that all children who acquired United States citizenship by descent at birth abroad

> and who continue to reside outside the United States shall, in order to receive the protection of the Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

In explaining this new provision the Citizenship Commission pointed out (H. Doc. 326, 59th Cong., 2d Sess., p. 17) that many countries required military service at age 18, but that the policy of our government protected dual nationals until the age of 21, at which time they were permitted "to choose whether they will remain American citizens or not". The Commission found this policy defective since "our Government may be called on to protect during the period of liability to military service a person who has no intention of ever residing in the United States or performing any obligations to it." The Commission concluded that: "It would appear reasonable and

desirable to resolve this ambiguity before it has served the purpose of a person whose intention is that of disloyalty to both the governments involved".

Section 6 of the 1907 Act admittedly related only to possible loss of diplomatic protection, rather than to retention or loss of United States citizenship. 3 Hackworth, *Digest of International Law,* 24; Gettys, *The Law of Citizenship in the United States,* 29–30. Yet it is also clear that this statute was concerned with "election of citizenship by those coming to majority". *Weedin* v. *Chin Bow,* 274 U.S. 657, 668–669. As we have shown, the situation of such dual nationals had long been a matter of concern to our Government.

This concern increased when Congress enacted Section 1 of the Act of May 24, 1934, 48 Stat. 797, which, as we have noted, for the first time gave to American mothers equal rights to transmit United States citizenship to their children born abroad. Observing that such a child might be born into a household with divided allegiance, Congress provided that

> where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States * * *.

In this directive the 1934 Act went beyond its 1907 predecessor by providing that "the right of citizenship shall not descend," instead of prescribing merely for loss of diplomatic protection, and by requiring

actual residence in the United States for five years prior to the age of 18, as the primary method for demonstrating an election of United States citizenship, by a person born abroad to one citizen parent.[26] In explaining this change the House Committee noted that the bill equalized American mothers with American fathers, and

> provides that such children shall have United States citizenship on condition * * * that the child, prior to its 18th birthday, returns to the United States and resides here at least 5 years.

H. Rep. 131, 73d Cong., 1st Sess., p. 2; S. Rep. 865, 73d Cong., 2d Sess., p. 2. The 1934 Act prescribed no retention condition where both parents were United States citizens when the child was born, providing for unconditional transmission of citizenship to such a child if either parent had previously resided in the United States.[27]

The floor debates in Congress on the 1934 legislation were largely concerned with the questionable loyalty of children born abroad to an American mother and an alien father and the need to require such children to make an election between their conflicting allegiances. In the course of the House debate,

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[26] The provisions of the 1934 amendment were not retroactive. *Montana* v. *Kennedy*, 366 U.S. 308. Therefore, its retention condition did not apply to persons previously born. *Reuff v. Brownell*, 116 F. Supp. 298 (D. N.J.); *Ngow* v. *Brownell*, 132 F. Supp. 426 (E.D. Wisc.).

[27] Subsequent statutes have made similar provisions. See Section 201(c), Nationality Act of 1940, 54 Stat. 1138; Sec. 301(a)(3), Immigration and Nationality Act, 8 U.S.C. 1401(a)(3).

Representative Dickstein, Chairman of the House Committee on Immigration and Naturalization and chief sponsor of the measure, observed (78 Cong. Rec. 7330) that "these children would have to make a declaration. In other words they cannot have dual nationality." Thereafter, the following colloquy occurred (*id.*, p. 7331):

> Mr. Dickstein. * * * The gentleman, as I understand, asked me the simple question of whether there will be dual nationality of such a child if this bill is passed; in other words, such a child will have the citizenship of the father, and also under this measure he will have the nationality of the mother. Is that correct?
>
> Mr. Cox. That is correct; yes.
>
> Mr. Dickstein. * * * such a child would have to make an election at his eighteenth birthday and would have to make a declaration prior to his eighteenth birthday when he enters the United States.

Representative Millard, member of the Committee, successfully urged addition of a provision for an oath of allegiance at age 21 "because I can see where such a child might not have the best interest of this country at heart and not be willing to take the oath of allegiance and perhaps would become a bad citizen" (*id.*, p. 7333). Representative Oliver also favored an oath of allegiance at age 21 "because we do not want to grant citizenship to the child of an American mother simply because it is the child of an American mother unless it chooses to be loyal to America. * * *

The child might want to take the citizenship of the father, and it should if it feels so disposed." (*Id.* p. 7348.) Representative Dirksen discussed the dual nationality of the child and the need to establish residence in the United States "before the inchoate right of citizenship becomes complete". (*Id.* at pp. 7341–7342.)

The purpose of the condition regarding retention of citizenship is explained more fully in the report of the Cabinet Committee (consisting of the Secretary of State, the Attorney General, and the Secretary of Labor), whose five-year study eventually culminated in the Nationality Act of 1940, 54 Stat. 1137. *Codification of the Nationality Laws of the United States,* House Committee Print, 76th Cong., 1st Sess. The Cabinet Committee's expressions assume added weight, since its views were solicited and its approval obtained in the consideration of the 1934 Act. S. Rep. 865, 73d Cong., 2d Sess. In commenting on the condition subsequent introduced by the 1934 Act, the Cabinet Committee stated (*Codification of Nationality Laws,* Vol. 1, p. 9) that

> Congress seems to have realized that in extending the principle of *jus sanguinis* to cover cases of children born abroad to American women who had married aliens subsequent to Cable Act of September 22, 1922 (42 Stat. 1021)[28]

[28] The Cable Act provided that an American woman who married an alien would retain her own nationality. Under the Act of 1907 such a woman would have assumed her husband's citizenship, thereby creating a family unity of citizenship. See *Mackenzie* v. *Hare*, 239 U.S. 299.

> * * * it would be necessary to insert limitations which do not appear in section 1993 of the Revised Statutes in its original form * * *.

The Cabinet Committee found that in the more common situation a child is born abroad to American parents who are both American citizens and who are engaged in promoting American interests. The Committee declared (*id.*, p. 11) that

> In such cases it is altogether likely that the children will be taught to speak the English language from infancy and will be so brought up that they will be truly American in character. This is likely to be the case where both parents are citizens of the United States.

The Cabinet Committee also proposed that the condition subsequent for retention of citizenship be made inapplicable where there was only one citizen parent, if the parent was abroad to promote specified American interests.[29] In this connection the Committee commented:

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[29] While such a reservation appeared in Section 201(g) of the 1940 Act (Appendix A, Item 6, *infra*, pp. 44–45), it was eliminated in Section 301(b) of the 1952 Act (*id.*, Item 7). When the 1952 Act was under consideration, the comments on the pending bills prepared by the General Counsel, Immigration and Naturalization Service (Analyses of S. 3455, 81st Cong. (pp. 301–7) and S. 716, 82d Cong. (pp. 301–6), which are lodged in the library of this Court), called attention to this omission, without making any specific recommendation. The Congressional committee reports made no further reference to this change, except to note that the conditions had been redefined "more realistically" in light of the many children born abroad to American servicemen who had married alien brides. The committee reports also emphasized that such children were required, in order to retain United States citizenship, to take up residence in this country before their 23d birthday. S. Rep. 1137 (pp. 38–39).

> In general, citizens of the United States residing abroad for the purposes just mentioned not only promote the interests of this country but are likely to retain their American sympathies and character. Therefore, such persons are likely, as a rule, to bring up their children as Americans, to see that they speak the English language, and to have them imbued with American ideals. The probabilities, however, would seem to be otherwise where the citizen parent who is married to an alien resides abroad for reasons having no connection with the promotion of American interests. [*Id.*, p. 14.]

For the latter group the Cabinet Committee recommended continuance of the requirement that the child must establish residence in the United States in order to retain the citizenship acquired at birth abroad. However, the Committee found the 1934 Act provision too rigid, since requiring the establishment of United States residence before age 13

> means that a child still of tender years must be separated from his parents or else that his parents, or one of them, must accompany the child to the United States and reside here with him. [*Id.*, p. 9.]

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H. Rep. 1365 (p. 76), 82d Cong., 2d Sess. It is obvious that the 1952 Act deliberately reinstated the retention requirements for foreign-born children of a single citizen-parent who was abroad to promote specified American interests. Even in the absence of specific expressions, it seems proper to conclude that Congress deemed that since the time of election had been advanced to age 23, such children should be required to express their own choice in deciding whether to retain American citizenship.

Therefore the Cabinet Committee proposed to advance to age 16 the cut-off date of the child's required commencement of United States residence and to make this liberalization retroactive to births abroad subsequent to May 24, 1934, explaining that as 13 years had not yet elapsed since the 1934 Act "the requirements contained therein for retention of citizenship have not yet gone into effect, and * * * are to be supplanted by the corresponding provisions in subsection (g)". *Id.*, p. 14.

The pertinent recommendations of the Cabinet Committee were adopted by Congress in Sections 201 (g) and (h) of the Nationality Act of 1940, 54 Stat. 1139.[30] The legislative reports did not contain any additional comments on the provisions in question. See S. Rep. 2150, 76th Cong., 3d Sess., p. 4; H. Rep. 2396, 76th Cong., 3d Sess.

The provisions for retention of citizenship were further liberalized and retroactively applied to children born abroad subsequent to May 24, 1934, by Sections 301(b) and (c), Immigration and Nationality Act of 1952, 8 U.S.C. 1401(b) and (c), which permitted the condition for retention of citizenship by the child to be satisfied by continuous physical presence of 5 years in the United States initiated prior

[30] The 1940 Act eliminated the 1934 Act's additional requirement for an oath of allegiance. Under the 1940 and 1952 Acts the establishment of residence in the United States for the prescribed period is the sole condition for retention of United States citizenship by the foreign born child of one citizen parent.

to the child's 23rd birthday.[31] A further liberalization by Section 16 of the Act of September 11, 1957, 71 Stat. 644, specified that absences from the United States of less than 12 months in the aggregate would not break the required continuity of physical presence.

D. THE RESIDENCE REQUIREMENT IS A REASONABLE CRITERION OF ALLEGIANCE TO THE UNITED STATES

In requiring that a foreign-born child establish residence in the United States when he reaches maturity, Congress has chosen a reasonable method of providing for an election by a dual national whose roots and loyalties may be entirely foreign. The statute thus prescribes two conditions to guard against divided loyalties of children born abroad. The first, designed to preclude the existence of successive generations of absentee citizens, is a condition precedent that the citizen parent must have previously resided in the United States. The second, designed to curtail dual nationality, is a condition subsequent requiring the foreign born child to make an election when he

[31] Although these retroactively liberalized provisions were proposed slightly less than 16 years after May 24, 1934, they were not enacted and effective until the end of 1952. In *Fee* v. *Dulles*, 236 F. 2d 885 (C.A. 7), the court held that the 1952 Act had not restored citizenship apparently lost by foreign born children of a single citizen parent who had become 16 years of age during the hiatus between May 24, 1950, and December 24, 1952. In this Court the Government confessed error, urging that the more liberal provisions were designed to benefit all who had been born abroad subsequent to May 24, 1934. See Respondent's Brief in Opposition, No. 58, Oct. Term 1957. This Court reversed upon the Government's confession of error. 355 U.S. 61.

attains maturity. In both instances residence in the United States is the talisman of demonstrated attachment to this country.[32]

In *Weedin* v. *Chin Bow,* 274 U.S. 657, this Court approved the statutory condition which limited inheritance of citizenship to children whose fathers had previously resided in the United States. Rejecting the attempted construction which would have conferred citizenship upon a child whose father commenced to reside in the United States after the child's birth, this Court observed (274 U.S. at 667) that such construction:

> extends citizenship to a generation whose birth, minority and majority, whose education, and whose family life, have all been out of the United States and naturally within the civilization and environment of an alien country. The beneficiaries would have evaded the duties and responsibilities of American citizenship. * * *

While the Court's observations relate to the prior residence of the transmitting parent, they are equally relevant to the situation of the beneficiary child, reared

[32] The court below recognized "that 'jus sanguinis' may provide a tenuous link to the national state when citizenship is conferred by virtue of the citizenship of only one parent." 296 F. Supp. at 1252, n. 17. Yet it felt that "the specter of generations of child emigres" was averted by the required prior residence of the parent. Obviously the court overlooked the reasonable purpose to assure the solidity of the dual national child's link to the United States and to require him to show his attachment to this country by establishing residence here at maturity. In the estimation of Congress, this second condition was equally important to preclude the existence of a class of foreign born citizens with tenuous allegiance.

in an alien environment. Thus, the Court stated with respect to R.S. 1993 that

> It is not too much to say, therefore, that Congress at that time attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent from those who had been born citizens * * *. [274 U.S. at 665.] [33]

As we have noted, a fixed period of residence in the United States has always been a prescribed condition for aliens seeking naturalization. And a native born citizen who acquires foreign citizenship through the naturalization of his parents is required to demonstrate his election of United States citizenship by establishing residence in the United States prior to his 25th birthday. See Section 349(a)(1), Immigration and Nationality Act, 8 U.S.C. 1481(a)(1); Section 401(a), Nationality Act of 1940, 54 Stat. 1168; and *Perkins* v. *Elg,* 307 U.S. 325. Moreover, the laws of many other countries similarly require establishment of residence in the parent country at maturity as a condition for retention of such citizenship.[34] And the

[33] The Court's opinion also quoted an excerpt from a communication of Secretary of State Fish to U.S. Minister Washburn, which observed that: "the heritable blood of citizenship was thus associated unmistakeably with residence within the country which was thus recognized as essential to full citizenship." *Id.*, pp. 665–666.

[34] Countries imposing such a condition subsequent, similar to that found in our laws, include Denmark, Finland, Iceland, Norway, and Sweden. In addition, the establishment of allegiance through registration, oath of allegiance or election is a condition for retention of citizenship by descent in Albania, Australia, Canada, Ceylon, Costa Rica, Great Britain, India,

draft international nationality code proposed by the Harvard Research in International Law similarly stipulates that a dual national at birth shall retain only the nationality of the country in which he last had his habitual residence at age 23. *Harvard Research*, pp. 41–44. The retention condition under consideration here is thus both rational and supported by abundant analogy and precedent.[35]

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Japan, Liberia, New Zealand, Pakistan, South Africa and Southern Rhodesia. See *Laws Concerning Nationality*, U.N. Legislative Series, St/Leg/Ser. B/4; *Harvard Research*, p. 31.

[35] There is widespread scholarly approval of the residency requirements for acquisition and retention of citizenship by children born abroad. In discussing the practices of various nations, including the United States and England, *Harvard Research* observes (p. 31):

"It seems quite undesirable that the nationality of any state should be acquired *jure sanguinis* by unlimited generations of persons born in the territory of another state, and having the nationality of the latter under its law. While nationality is not necessarily dependent upon domicile, it is self evident that it can not be completely divorced from it. Under normal conditions most of the nationals of any state will have their habitual residence within its territory; otherwise nationality becomes meaningless."

Thereafter, in proposing a universal nationality code, including retention conditions similar to those found in our laws, the Harvard study comments (p. 42):

"It seems reasonable that a person born in a country of which his parents are not nationals should, within certain limitations, be able to choose between the nationality of the country of birth and that of his parents. On the other hand he should be required to make such choice within a limited period after reaching the age of majority, which in most countries would be twenty-one years. Varying ages of majority with reference to naturalization are found in the nationality laws of various countries, but the age of twenty-one is, perhaps, predominant.

"It is believed that the actions of the individual upon attaining majority, particularly his choice in maintaining his home

Even the court below acknowledged the reasonableness of the condition subsequent prescribed by Congress, stating, 296 F. Supp. at 1252:

> There is an undeniable danger that children, born and raised abroad, in a foreign home, where English may never be spoken, schooled where English is not taught, celebrating foreign holidays with the family of the non-American parent, will have no meaningful connection with the United States, its culture or heritage. It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States. * * *

Yet the court below found that Congress was powerless to deal with this situation, except by denying citizenship benefits at birth to the foreign born child.[36] In our view Congress does have the power to deal with a dual national's split allegiance by requiring

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in one country or the other, rather than a mere declaration, should determine the nationality which he is to retain thereafter, although he should be allowed a reasonable period within which to make his decision and act accordingly. For this purpose two years seems sufficient.

"An examination of the nationality laws of the various states will show that domicile and residence play a very considerable part in determining the nationality of persons born in one state of parents having the nationality of another state."

[36] Judge Leventhal's concurring opinion (296 F. Supp. at 1253) suggested "that Congress can impose reasonable conditions that must be met before citizenship is recognized". A number of countries, chiefly in Latin America, postpone the vesting of citizenship for a foreign born child until such conditions are met. See note 19, p. 18, *supra*. *However*, as we have previously indicated (*supra*, p. 19), this is an unsatisfactory alternative.

him to elect the nationality of his choice upon reaching maturity.

As we have pointed out above, the residence requirements of Section 301(b), unlike the provision struck down in *Schneider,* cannot be held unreasonable on the ground that they are excessively burdensome. Section 301(b) does not in any way limit a person's mobility, except that it requires one affirmative showing of the kind of attachment to the United States on which the grant of citizenship is premised. Once this residency requirement has been met, no further restriction hangs over a person's citizenship. To find that this requirement is unreasonable is to say that Congress cannot simultaneously bestow the benefits of citizenship at birth on foreign-born children and yet still protect this country's interest in limiting citizenship to those persons who have at least some substantial attachment to the United States. We submit that the Constitution does not establish a right of permanent absentee citizenship.

Appellee is now 30 years of age, and has lived for most of his life in Italy, the country of his birth.[37] He became an Italian citizen at birth. He has been in this country only on five brief visits, has never lived here, and there is no indication that he will ever live in the United States. There is no contention that his failure to comply with the conditions imposed by Congress upon the grant of citizenship was due to

[37] Since appellee is concededly an Italian citizen, there is no question of statelessness here.

ignorance or mistake. It is stipulated that he was warned several times of the need to begin residence in the United States no later than his twenty-third birthday.

As a dual national born abroad who failed to take the prescribed steps to demonstrate American allegiance, appellee has probably satisfied the test of "actions in derogation of undivided allegiance to this country", suggested by Chief Justice Warren (dissenting, in *Perez* v. *Brownell*, 356 U.S. 44, 68) as an acceptable basis for relinquishment of United States citizenship.[38] Indeed, his conduct might be deemed a

[38] Although the terms used in *Afroyim* are "assent", "forcible destruction", and "voluntary relinquishes" (387 U.S. at 257, 268), earlier expressions couched this concept in somewhat different language. Thus, in addition to the "derogation of undivided allegiance" language quoted above, the dissent of Chief Justice Warren in *Perez* also referred at several points to "transfer", "abandonment", and "surrender" of allegiance. 356 U.S. at 69, 73, 76, 78. It may be significant that in *Afroyim* the Court stated (387 U.S. at 267): "we agree with the Chief Justice's dissent in the *Perez* case". The dissenting opinion of Justice Douglas in *Perez* also referred to "abandonment of * * * allegiance". 356 U.S. at 80. In his concurring opinion in *Nishikawa* v. *Dulles*, 356 U.S. 129, 139, Justice Black spoke of the right "to abandon or renounce". In *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 159, n. 11, the Court declared: "There is, however, no disagreement that citizenship may be voluntarily relinquished or abandoned, either expressly or by conduct." In his dissenting opinion in *Mendoza-Martinez* Justice Stewart referred to "conduct inconsistent with undiluted allegiance to this country". (p. 214) The latter observation of Justice Stewart was quoted, apparently with approval, by the Court in *Schneider* v. *Rusk*, 377 U.S. 163, 168.

voluntary relinquishment or abandonment of that citizenship.[39] In any event, we believe it is not necessary to reach these issues, since this is not a Fourteenth Amendment citizenship. We submit that Section 301(b) establishes a reasonable condition, which Congress was empowered to prescribe when it granted the title to citizenship on which appellee relies. By failing to comply with that condition, appellee has lost his right of American citizenship.

## CONCLUSION

The judgment of the ~~court of appeals~~ district should therefore be reversed and the cause remanded ~~to the district court~~ with directions to dismiss the complaint.

Respectfully submitted,

ERWIN N. GRISWOLD,
*Solicitor General.*

WILL WILSON,
*Assistant Attorney General.*

CHARLES GORDON,
*General Counsel,*
*Immigration and Naturalization Service.*

NOVEMBER 1969.

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[39] In *Gonzalez-Gomez* v. *Immigration and Naturalization Service* (Appendix B, *infra*, pp. 48–49), the court found that in consciously disregarding the legislative mandate the foreign born citizen "voluntarily chose not to retain his United States citizenship."

## APPENDIX A

### Applicable Constitutional and Statutory Provisions

1. *U.S. Constitution, Fifth Amendment.*

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

2. *U.S. Constitution, Fourteenth Amendment.*

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. * * *

3. *Section 1993 of the Revised Statutes, before its amendment in 1934.*

All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

4. *Section 6, Act of March 2, 1907, 34 Stat. 1229.*

That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens

of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority.

5. *Section 1 of the Act of May 24, 1934, 48 Stat. 797.*

That section 1993 of the Revised Statutes is amended to read as follows:

> Sec. 1993. Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Immigration and Naturalization Service.

6. *Section 201 of the Nationality Act of 1940, 54 Stat. 1139, in pertinent part.*

The following shall be nationals and citizens of the United States at birth:

* * * * *

> (g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided,* That in

order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further,* That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the Government of the United States or a bona fide American, educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation.

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

7. *Section 301 of the Immigration and Nationality Act, 8 U.S.C. 1401, in pertinent part.*

(a) The following shall be nationals and citizens of the United States at birth:

* * * * *

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was

physically present in the United States or its outlying possessions for a period or periods totalling not less than ten years, at least five of which were after attaining the age of fourteen years * * *.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[s] for at least five years: *Provided,* That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934: *Provided,* however, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

## APPENDIX B

In the United States District Court
Eastern District of California

No. F–151 Civil

VINCENTE GONZALEZ-GOMEZ, PETITIONER,

*vs.*

IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENT.

*Memorandum and Order*

The United States Court of Appeals for the Ninth Circuit remanded this case to this court pursuant to Section 106(a)(5) of the Immigration and Nationality Act, 8 U.S.C. 1105a(a)(5), to determine petitioner's claim of United States citizenship.

Petitioner was represented by Donald L. Ungar, Esq., and respondent was represented by Richard V. Boulger, Asst. United States Attorney.

It was stipulated that petitioner was a United States citizen at the time of his birth pursuant to Section 1993 of the Revised Statutes of the United States, as amended by the Act of May 24, 1934.

Petitioner was born in Mexico on July 25, 1938. His mother was and is a United States citizen, and his father, a citizen of Mexico.

Petitioner claims to have entered into the United States in 1955 and to have been here since, with the exception of visits to his mother in Tijuana.

However, petitioner has made so many contradictory statements and his demeanor on the stand gave the impression that he would testify to anything that would serve his purpose, so his testimony is entitled to very little weight.

The credible testimony establishes that petitioner considered himself a citizen of Mexico as late as 1964 and that he only visited the United States for short periods of time prior to his marriage in 1962. Thus, petitioner did not come to the United States before age 23 and be continuously physically present for five years as required by Section 301(b) of the Immigration and Nationality Act which is 8 U.S.C. 1401 (b) and (c), as he was 23 years old on July 25, 1961.

Although the Government's proof is clear and convincing, their burden of proof is only by a preponderance of the evidence as established by Congress pursuant to Section 349(c) of the Immigration and Nationality Act which is 8 U.S.C. 1481(c).

Petitioner also challenges the constitutionality of Section 301(b), alleging that it deprives him of citizenship while the Supreme Court has ruled that citizenship can only be lost by the voluntary act of the petitioner. *Afroyim* v. *Rusk,* 387 U.S. 253. This section is not unconstitutional as it applies to petitioner because Congress had the power to grant him citizenship and thus had the power to add the condition that he return and live in the United States in order to retain that citizenship. Also, petitioner was apparently aware of his dual citizenship and the requirement that he live in the United States and voluntarily chose not to retain his United States citizenship. So, it was his voluntary act that caused him to lose his status as a United States citizen.

*It is therefore ordered,* that petitioner is not a United States citizen.

Counsel for respondent is directed to prepare and lodge findings of fact, conclusions of law and form of judgment in accordance with the local rules of this court.

The clerk of this court is directed to serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

Dated: June 17, 1969.

M. D. CROCKER,
*United States District Judge.*

U.S. GOVERNMENT PRINTING OFFICE: 1969

IN THE

# Supreme Court of the United States

**October Term, 1969**

No. ~~170~~ 24

WILLIAM P. ROGERS, Secretary of State,
*Appellant,*

*v.*

ALDO MARIO BELLEI,
*Appellee.*

## APPELLEE'S BRIEF

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# TABLE OF CONTENTS



## TABLE OF AUTHORITIES

IN THE

# Supreme Court of the United States

October Term, 1969

No. 179

WILLIAM P. ROGERS, Secretary of State,
*Appellant,*

*v.*

ALDO MARIO BELLEI,
*Appellee.*

## APPELLEE'S BRIEF

### Question Presented

Can the Congress, consistent with the due process clause of the Fifth Amendment, withdraw United States citizenship, acquired at birth, absent a voluntary renunciation?

### Statement of the Case

The appellee, Aldo Mario Bellei, like his mother, has always valued his United States citizenship. He prizes it now. He has always wanted to have his United States citizenship. He wishes to have it now.

On four of the five times that he came to this country he traveled on a United States passport. The fifth time he wanted to do so, but our State Department would not permit it. That was the time he came here with his bride on their honeymoon to visit his grandparents on his mother's side.

Moreover, the appellee has never done anything to jeopardize his United States citizenship. At the time that our State Department advised him that he no longer held American nationality, he was working for an organization engaged in the NATO defense program.

The federal three-judge district court below succinctly stated the facts in one paragraph of its opinion:

> Plaintiff, from birth has been treated as an American citizen by the United States Government. He has been welcomed to this country without visas or other immigration papers required of foreigners. He has availed himself of his unlimited access to come to this country on several occasions and to visit with his mother's family. Plaintiff has also traveled at all times under American diplomatic protection. On his first two visits Bellei traveled on his mother's American passport. On the last two occasions when plaintiff visited the United States, he journeyed under his own American passport, which had been issued in 1952 and periodically renewed until 1964. He was subject to the military service laws and he registered for the draft in 1960.[3]

3. His scheduled induction in 1963 was deferred because of his employment with a NATO defense program.

296 F. Supp. at 1248 (A. 16-17).

The appellee was born at Ancona, Italy, on December 22, 1939. His mother, Theresa Lola Bellei, nee Cesaretti, was born in Philadelphia, Pennsylvania, on March 14, 1915 and resided in the United States until March 23, 1939. When she was 24 years old, she went to Italy to live with her husband, whom she had married in Philadelphia, Pennsylvania, on March 14, 1939. At the time of appellee's birth his mother was, and always has been a citizen of the United States (A. 5).

The appellee was physically present in the United States from April 27, 1948 to July 31, 1948, from July 10, 1951 to October 5, 1951, from June of 1955 until October of 1955, from December 18, 1962 to February 13, 1963, and from May 26, 1965 to June 13, 1965. On the first two such occasions the appellee came to the United States on his mother's passport. She was in possession of a United States passport, and was admitted to the United States with her children as citizens of this country. On the next two such occasions, he came to the United States on his own United States passport, and was admitted to the United States as a citizen of this country (A. 5-6).

For nearly a dozen years, from 1952 to 1964, the appellee as a United States citizen had his own United States passport. He was first issued his own United States passport on June 27, 1952. Thereafter his passport was periodically renewed (A. 6).

On March 28, 1960 the appellee registered under the Selective Service laws of the United States with the American Consul in Rome, Italy. He was asked to report for a physical examination and passed such examination

by the U.S. Army at Leghorn, Italy. On December 11, 1963 he was asked to report for induction at Washington, D.C., but his induction was deferred because he was employed on a NATO defense program. After February 14, 1964 he received a letter from the United States Selective Service explaining that due to loss of his United States citizenship he had no further obligations for military service on behalf of the United States (A. 8).

## Summary of Argument

Revised Statutes §1993, as amended by the Nationality Act of 1934, conferred United States citizenship upon the appellee Aldo Mario Bellei at his birth on December 22, 1939. Section 1993, as amended, with its conditions subsequent, was repealed by the Nationality Act of 1940, but Section 504 of this act, 54 Stat. 1172, 1174, 8 U.S.C. §904 (1940 ed.), provided that this repeal "shall not terminate nationality heretofore lawfully acquired." The Congress cannot, consistent with the due process clause of the Fifth Amendment, by a condition subsequent in the form of a five-year residence requirement, sought subsequently to be imposed by Section 301(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1401(b), involuntarily take away appellee's United States citizenship acquired at birth. *Schneider* v. *Rusk*, 377 U.S. 163 (1963); *cf. Afroyim* v. *Rusk*, 387 U.S. 253 (1967).

As a result, the appellee has dual nationality; but the concept of dual nationality as a thing of evil is on its way to becoming obsolete in today's world of United Nations. In today's world, persons with dual nationality should be regarded as an asset rather than a liability.

## ARGUMENT

**Section 301(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1401(b), which seeks to expatriate the plaintiff without his consent, violates the due process clause of the Fifth Amendment.**

Section 301(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1401(b) unconstitutionally seeks to expatriate the plaintiff without his consent because he was not continuously physically present in the United States for at least five years between the ages of fourteen and twenty-eight. In seeking to expatriate the plaintiff without his consent, this section violates the due process clause of the Fifth Amendment. Two recent cases point to this result: *Schneider* v. *Rusk*, 377 U.S. 163 (1963); *Afroyim* v. *Rusk*, 387 U.S. 253 (1967).

Indeed, it may fairly be said that *Schneider* is directly in point. Appellant Angelika Schneider, a German national by birth, acquired derivative United States citizenship through her mother by statute. Thus she was just as much a statutory citizen as appellee is.

Subsequently she returned to Germany, married a German national, and resided in Germany thereafter. In 1959 our State Department certified that she had lost her American citizenship under the provisions of section 352(a)(1) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1484(a)(1), which expatriated naturalized citizens for continuous residence for three years in the country of their birth.

Appellant had four sons, two born before 1959 and two after. As to them the Court said:

> * * * Two of her four sons, born in Germany, are dual nationals, having acquired American citizenship under §301(a)(7) of the 1952 Act. The American citizenship of the other two turns on this case.

377 U.S. at 164.

The Court held that section 352(a)(1), 8 U.S.C. §1484 (a)(1), violated the due process clause of the Fifth Amendment, saying in the concluding paragraph of its opinion:

> This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is "so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe*, 347 U.S. 497, 499. A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons.

377 U.S. at 168-69.

In *Afroyim* v. *Rusk*, 387 U.S. 253 (1967), the Court in a sense went even further; for there it held, overruling *Perez* v. *Brownell*, 356 U.S. 44 (1958), that a United States citizen would not lose his citizenship by the affirmative act of voting in a foreign election. In that case the petitioner was a naturalized American citizen who had been born in Poland, and had voted in an Israeli election. The Court after pointing out that it had "consistently invalidated on a case-by-case basis various other statutory sections providing for involuntary expatriation" (at p. 255), held unequivocally that no citizen's citizenship could be taken away without his consent (except of course for a naturalization unlawfully procured). The Court reasoned:

> Petitioner, relying on the same contentions about voluntary renunciation of citizenship which this Court rejected in upholding §401(e) in *Perez*, urges us to reconsider that case, adopt the view of the minority there, and overrule it. That case, decided by a 5-4 vote 10 years ago, has been a source of controversy and confusion ever since, as was emphatically recognized in the opinions of all the judges who participated in this case below. Moreover, in the other cases decided with and since *Perez*, this Court has consistently invalidated on a case-by-case basis various other statutory sections providing for involuntary expatriation. It has done so on various grounds and has refused to hold that citizens can be expatriated without their voluntary renunciation of citizenship. These cases, as well as many commentators, have cast great doubt upon the soundness of *Perez*. * * *
>
> * * *
>
> First we reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an

> American citizen's citizenship without his assent. This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. The Constitution, of course, grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power. * * *
>
> * * *
>
> * * * Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship.
>
> *Perez* v. *Brownell* is overrruled. The judgment is *Reversed.*

387 U.S. at 255-56, 257, 268.

The appellant, seizing on a qualified concession by the court below (296 F.Supp. at 1252; A. 24), tries to make out that dual nationality is an evil (Br. pp. 22-24). There is another point of view: in today's world of United Nations, dual nationality may be a step in the right, not the wrong, direction.

The appellant talks about "permanent absentee citizenship" (Br. p. 40). This is an exaggeration. Under section

301(a)(7) of the Immigration and Nationality Act of 1952, 8 U.S.C. §1401(a)(7), a person born abroad, only one of whose parents is a United States citizen, cannot be a United States citizen at birth unless his United States citizen parent was "a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years." Nor can a child of appellee born abroad be a United States citizen at birth unless appellee "prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years."

The appellant in its brief (p. 39) stresses the lower court's qualified concern that persons such as the appellee "will have no meaningful connection with the United States, its culture or heritage." Of course as to the appellee this statement is not true. He did and does have meaningful connections with the United States, its culture and heritage. He came here repeatedly. His grandparents live here. He was subject to the military service laws and registered for the draft. He took and passed the United States Army physical examination. He was employed on a NATO defense program.

Nor is the statement about lack of meaningful connections with the United States true generally. For example, American women married to Europeans have formed a Paris-based organization called Association of American

Wives of Europeans. One of the purposes of the organization is to give to the children of these mothers some of the emotional attachment which their mothers feel for the United States, and to instill that attachment in these children at an early age. The Association has accordingly developed a program designed to give these children a large measure of American culture and heritage. American holidays are celebrated. There are reading courses in English. There are study groups in American history. The United States, rather than casting aside this valuable new generation of international children, should try to keep them for itself.

## Conclusion

**The judgment of February 28, 1969 of the three-judge federal district court for the District of Columbia should be affirmed.**

Respectfully submitted,

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FILE COPY



# In the Supreme Court
OF THE
# United States

OCTOBER TERM, 1969

No. ~~179~~ 24

WILLIAM P. ROGERS, Secretary of State,
*Appellant,*

vs.

ALDO MARIO BELLEI,
*Appellee.*

**On Appeal from the United States District Court for the District of Columbia**

## AMICUS CURIAE BRIEF OF VICENTE GONZALEZ-GOMEZ

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# INDEX

## Authorities Cited

### Cases



### Constitutions



### Statutes

# In the Supreme Court
OF THE
# United States

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**On Appeal from the United States District Court for the District of Columbia**

## AMICUS CURIAE BRIEF OF VICENTE GONZALEZ-GOMEZ

### INTEREST OF AMICUS

The interest of *amicus,* Vicente Gonzalez-Gomez, is readily apparent. For the outcome of the instant case may well determine whether he too is an American citizen and whether he shall be allowed to continue living in this country.

Vicente Gonzalez-Gomez was born in Mexico on July 25, 1938. Since his mother was then an American

citizen, he acquired American citizenship at birth pursuant to the provisions of Section 1993 of the Revised Statutes, as amended by the Act of May 24, 1934, 48 Stat. 797.

In 1964, proceedings were instituted by the Immigration and Naturalization Service to deport him from the United States to Mexico. Although conceding that Gonzales had been an American citizen, the government contended that he had lost his citizenship by failing to comply with the provisions of section 301(b) of the Immigration and Nationality Act, 8 U.S.C. 1401(b), the same statute which is in issue here. The service found that he had lost his citizenship and thus was in the United States unlawfully. He was ordered deported.

Gonzalez thereupon filed a petition for judicial review in the Court of Appeals for the Ninth Circuit, pursuant to the provisions of section 106 of the Immigration and Nationality Act, 8 U.S.C. 1105a. The proceedings were remanded in accordance with section 106(a)(5)(B) to the District Court for the Eastern District of California for a hearing de novo upon Gonzalez' claim to American citizenship.

Following the evidentiary hearing, the District Court found that Gonzalez had not complied with the provisions of section 301(b). It also rejected his claim that section 301(b) was unconstitutional. The District Court's opinion is printed in the appendix to appellant's brief.

## ARGUMENT

### I

### THE ABSENCE OF SPECIFIC LANGUAGE IN THE FOURTEENTH AMENDMENT RELATING TO THE ACQUISITION OF CITIZENSHIP AT BIRTH IN FOREIGN COUNTRIES DOES NOT ALTER THE FUNDAMENTAL HOLDING OF THIS COURT IN AFROYIM v. RUSK THAT EVERY AMERICAN CITIZEN IS PROTECTED AGAINST THE INVOLUNTARY LOSS OF CITIZENSHIP.

The main thrust of the government's argument is that *Afroyim v. Rusk,* 387 U.S. 253, does not shelter from involuntary loss the citizenship of those who derived it through their parents at birth abroad.[1] To reach its conclusion, the government reasons that *Afroyim* found in the Fourteenth Amendment a prohibition against congressional destruction of citizenship; that the Fourteenth Amendment refers only to citizens who "are born or naturalized in the United States"; that appellee was not "born or naturalized in the United States"; hence that *Afroyim* does not invalidate the provisions of section 301(b) of the Immigration and Nationality Act, 8 U.S.C. 1401(b).

The government's argument overlooks the following considerations:

A. This Court's holding in *Afroyim* was an extensive and sweeping one. There is no reason to believe it deliberately and consciously chose to leave such a broad class of citizens unprotected against involuntary expatriation.

---

[1]Hereinafter referred to as derivative citizens or derivative citizenship.

B. The government's reasoning would drain all meaning from the privileges and immunities clause of the Fourteenth Amendment with respect to derivative citizens.

C. The sources of this Court's opinion in *Afroyim* can be traced beyond the Fourteenth Amendment. There is even less reason, therefore, to adopt the narrow intepretation of the amendment urged by the government.

**A. The Broad Sweep of Afroyim v. Rusk**

It is difficult to accept the proposition that the absence of any reference in *Afroyim v. Rusk* to derivative citizens indicates this Court was not concerned about the possibility of their involuntary expatriation.

As the District Court below correctly noted, such an interpretation would be "incompatible with the broad and forceful position put forth by the Supreme Court to protect an important constitutional right." *Bellei v. Rusk*, 296 F. Supp. 1248, 1249.

Indeed, it would be difficult to conceive of more forceful or sweeping language than that employed in the *Afroyim* opinion itself.

> "We hold that the Fourteenth Amendment was designed to, and does, protect *every* citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race." 387 U.S. at 268. (Emphasis added.)

Does the Court's failure to add the phrase "or in whatever manner citizenship was acquired" really

mean it chose to leave out derivative citizens? It hardly seems likely. The Court, quite plainly, was talking about all citizens.

**B. The Privileges and Immunities Clause**

Perhaps an even more fundamental flaw in the government's argument is the effect it would have upon application of the privileges and immunities clause of the Fourteenth Amendment.

That clause, of course, provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;"

The clause does not distinguish among citizens in any way. Presumably, it would protect all citizens, regardless of the manner in which they acquired citizenship.

Yet if the government's position is correct, and if the Fourteenth Amendment was never meant to apply to derivative citizens because of the absence of such language from the citizenship clause, then presumably the states would be free of the restraints of the second clause and could proceed to deny a derivative citizen, even one who had complied with the statutory residence requirements, his right to vote in a national election or any other privilege or immunity granted to him as a citizen of the United States.

Surely that is an impermissible conclusion.

**C. The Sources of the Afroyim Decision Can Be Traced Beyond the Fourteenth Amendment. There Is Even Less Reason, Therefore, To Adopt The Narrow Reading Of The Amendment Urged By The Government.**

Although this Court's opinion in *Afroyim v. Rusk* concludes with a finding that the Fourteenth Amendment prevents Congress from providing for the involuntary loss of American citizenship, it is evident that the sources of its holding can be traced beyond the Fourteenth Amendment itself.

What the decision holds, we submit, is that the Fourteenth Amendment merely guarantees what was already the case—that the very nature of the citizen's relationship with the state in a free society precludes the involuntary termination of that relationship by the state.

Agreeing with the dissent of Chief Justice Warren in *Perez v. Brownell,* 356 U.S. 44, 64, 65, the Court said:

> "Our holding we think is the only one that can stand in view of the language and the purpose of the Fourteenth Amendment, and our construction of that Amendment, we believe, comports more nearly than Perez with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted *to guarantee.* Citizenship is no light trifle to be jeopardized any moment Congress decides to do so under the name of one of its general or implied grants of power. In some instances, loss of citizenship can mean that a man is left without a country. Citizenship in this Nation is a part of a cooperative affair. Its citizenry is the country and the country is its citizenry. *The very nature of our*

> *free government* makes it completely incongruous to have a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship." 387 U.S. at 267, 268. (Emphasis added.)

The Chief Justice in his dissent did not find the prohibition against involuntary expatriation in the Fourteenth Amendment alone. Rather, he looked upon the amendment as "crystalizing" a prohibition that had always existed and which was derived from the very makeup of a free society. 356 U.S. at 65.

The government's point is that the Fourteenth Amendment does not refer to derivative citizens. But if all citizens were protected from involuntary expatriation before the amendment's adoption, there would be still less reason to accept a narrow, limited, and literal reading of the amendment in order to take the precious right of citizenship from a derivative citizen.

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## II

**EVEN ASSUMING THE ABSENCE OF A FOURTEENTH AMENDMENT PROHIBITION, SECTION 301(b) CANNOT MEET THE TEST OF DUE PROCESS AS SET FORTH IN SCHNEIDER v. RUSK.**

The decision in *Schneider v. Rusk*, 377 U.S. 163, rests upon a foundation wholly different from that of *Afroyim v. Rusk*, supra.

At the time, a majority of this Court still accepted the view announced in *Perez v. Brownell*, 356 U.S. 44, that Congress could take away citizenship if that was a means reasonably calculated to achieve an end within the power of Congress to achieve.

The constitutional test applied in *Perez* and thus in *Schneider,* was a Fifth Amendment due process test. Interpretation of the Fourteenth Amendment was not an issue.

The statute struck down in *Schneider v. Rusk* was section 352(a)(1) of the Immigration and Nationality Act, 8 U.S.C. 1484(1), which provided for the expatriation of naturalized citizens who had resided for three years in the country of their former nationality or place of birth.

To the Court, mere foreign residence did not provide a rational nexus between the withdrawal of citizenship and implementation of congressional power over foreign affairs. But at the heart of its decision was the concept that in order to overcome the Fifth Amendment's prohibition against unjustifiable discrimination, the expatriating act itself must involve conduct inconsistent with allegiance to the United States.

Quoting at length from Justice Stewart's dissent in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 214, in which Justice Stewart pointed out that prior decisions upholding involuntary expatriation all involved conduct "inconsistent with undiluted allegiance" to the United States, the Court found simply that foreign residence has nothing to do with allegiance. Said the Court:

> "Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It

> may indeed be compelled by family, business, or other legitimate reasons." 377 U.S. at 169.

Section 301(b), the statute here in question, also provides for involuntary expatriation by reason of continued foreign residence. It is no different from the statute involved in *Schneider v. Rusk* and should be struck down for the same reasons.

The government would find a distinction between the two on the basis of reasonableness. In *Schneider*, says the government, the Court ruled out an unreasonable discrimination between native born and naturalized citizens. But it did not outlaw "reasonable conditions imposed in situations not governed by the Fourteenth Amendment." (Appellant's brief, p. 11.)

Just why one is an "unreasonable discrimination" and the other is a "reasonable condition," when both statutes would take away citizenship on the basis of foreign residence, is not entirely clear. If the government's point is that derivative citizens are not governed by the Fourteenth Amendment, it should be sufficient to point out that the *Schneider* decision did not rest upon the Fourteenth Amendment.

Once again missing the point, the government later suggests that section 301(b) does not create the kind of "second class citizenship" prohibited by *Schneider*. Rather, it merely assures that a derivative citizen will demonstrate in a reasonable manner his identification with and allegiance to the United States. (Appellant's brief, p. 20.)

But the whole point of *Schneider v. Rusk* is that foreign residence has nothing to do with allegiance!

One may remain abroad for reasons having no connection with a lack of allegiance to the United States.

Nor does it add anything to argue that 301(b) is distinguishable because it merely requires a person to make "one showing" of his attachment to this country and does not place a permanent restriction upon his citizenship. (Appellant's brief, p. 21.)

What the government calls "one showing" is in fact a requirement that the derivative citizens be "physically present" (not merely have a residence) in the United States for a continuous period of five years during a period in his life when he may wish to travel, or to seek an education abroad, or may have any other good and sufficient reason to remain abroad.[2]

That surely is a restriction to which neither the native born nor the naturalized citizen is subject, and creates another form of "second class citizenship."

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## III

### SECTION 301(b) IS AN EXPATRIATION STATUTE

The government's argument that section 301(b) does not really provide for the involuntary expatriation of American citizens anyway also is without merit.

First of all, the language of section 301(b) is clearly to the contrary. It provides explicitly that anyone who derives his citizenship through one

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[2] An aggregate of 12 months absence during the period is not counted. Sec. 16, Act of September 11, 1957, 71 Stat. 644.

citizen parent (Sec. 301(a)(7)), "shall lose" his citizenship if he fails to comply with the requisite conditions. Expatriation, of course, means the loss of citizenship.

Moreover, it is abundantly clear, not only from the language and effect of section 301 and its predecessors that persons affected became citizens at the time of their birth. There is and was no postponement of citizenship until they complied with the particular residence requirements.

Indeed, as the Court below has noted, a derivative citizen is subject to all of the duties and entitled to all of the rights and privileges of citizens before he is old enough even to comply with the so-called retention requirements.

Failure to comply with the provisions of section 301(b), therefore, can mean only one thing by any fair reading of the law—loss of citizenship. The fact is not changed by terming it a "condition subsequent" to the statutory grant of citizenship.

After all, one becomes a naturalized citizen only by statutory grant of Congress. The expatriatory provision struck down in *Schneider v. Rusk*, therefore, could just as well be termed a "condition subsequent" to the grant of naturalization. That is, since Congress has the power to grant naturalization upon its own terms, it could include conditions subsequent to assure continued allegiance.

The plain fact, however, it that the provision struck down in *Schneider*, as everyone agrees, was an expatriation statute. Section 301(b) is no different.

## IV

### IF SECTION 301(b) IS UNCONSTITUTIONAL, FAILURE TO COMPLY WITH ITS PROVISIONS CANNOT BE CONSIDERED A VOLUNTARY RENUNCIATION OF CITIZENSHIP.

The right of a citizen to give up his citizenship voluntarily is not disputed.

Seizing upon a comment of the District Court in the case of *Vicente Gonzalez-Gomez v. Immigration and Naturalization Service,* E.D. Calif. Civ. No. F-151, the *amicus* herein, the government hastens to suggest that the very failure to comply with section 301(b) indicates a voluntary choice to abandon American citizenship.

The flaw in that kind of logic should be apparent. If a person is given a choice between alternatives, one of which is unconstitutional, how can it be said he has made a voluntary or meaningful choice?

---

### CONCLUSION

We respectfully urge the Court to affirm the judgment of the District Court and to find section 301(b) to be unconstitutional.

Dated, San Francisco, California,
December 24, 1969.

DONALD L. UNGAR,
*Attorney for Amicus Curiae*
*Vicente Gonzalez-Gomez.*

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~370~~ 24

WILLIAM P. ROGERS, SECRETARY OF STATE OF THE UNITED STATES OF AMERICA,

Appellant,

*v.*

ALDO MARIO BELLEI,

Appellee.

## BRIEF OF ASSOCIATION OF AMERICAN WIVES OF EUROPEANS AND AMERICAN BAR ASSOCIATION, *AMICI CURIAE*

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

PAGE

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1969

No. 179

WILLIAM P. ROGERS, SECRETARY OF STATE OF THE UNITED STATES OF AMERICA,

Appellant,

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Appellee.

## BRIEF OF ASSOCIATION OF AMERICAN WIVES OF EUROPEANS AND AMERICAN BAR ASSOCIATION, *AMICI CURIAE*

### Interest of *Amici Curiae*

The Association of American Wives of Europeans is an organization based in Paris, France, formed in 1961 and composed of female American nationals married to Europeans and living in Europe. In many cases the members are the mothers of children who have been born outside the United States and who, because their husbands are not American citizens, find that the citizenship of their children is governed by the provision of the Nationality Act which is here under review (8 U.S.C., § 1401(b)). Members of the Association are concerned that these children will lose their United States citizenship if circumstances prevent their return to the United States for five years' continuous presence between the ages of 14 and 28.

The American Bar Association, with the approval of its Board of Governors, joins in this Brief *Amici Curiae* in *Rogers* v. *Bellei*, pursuant to the written consent of the parties hereto, which is on file with the Court. There are basic principles of law involved in this case which are of vital concern to the Association and its membership of over 125,000 lawyers. As a national professional organization of lawyers dedicated "to advance the science of jurisprudence" and "to apply its knowledge and experience in the field of law to the promotion of the public good", the Association is interested in having presented to the Court its views on the questions involved in this case and joins in the reasons, both of authority and policy, for the support and affirmance of the decision of the Court below.

## Question Presented

Whether Section 301(b) of the Immigration and Nationality Act of 1952 (8 U.S.C., § 1401(b)), providing that a person born abroad of one citizen-parent loses his American citizenship by failure to be physically present in the United States for five years continuously between the ages of 14 and 28, violates the due process clause of the Fifth Amendment or otherwise exceeds the powers of Congress under the Constitution.

## Statement

The facts in this case have been stipulated and can be briefly summarized as follows:

The Appellee, Aldo Mario Bellei, was born in Ancona, Italy on December 22, 1939 of an American mother and an Italian father. At the time of his birth in Italy he became, and still is, a citizen of Italy. He also acquired American citizenship by reason of his birth abroad of an American citizen-parent under the terms of Section 1993 of the Revised Statutes, as amended by Section 1 of the Act of May 24, 1934, 48 Stat. 797.

The Appellee has lived for most of his life in Italy. He came to the United States on five brief visits but never established residence in this country. On his first two trips to the United States he travelled on his mother's American passport; on the next two occasions he travelled on his own United States passport. His American passport was periodically renewed until December 22, 1962, his twenty-third birthday. Thereafter he was informed that he had lost his United States citizenship by virtue of Section 301(b) of the Immigration and Nationality Act of 1952, which provides that a person born abroad of one American parent loses his citizenship unless he is physically present in the United States for five years continuously between the ages of fourteen and twenty-eight. On his fifth visit to the United States, in 1965, Appellee used his Italian passport and was admitted to our country as an alien visitor.

On March 28, 1960, the Appellee registered under the Selective Service laws of the United States with the American Consul in Rome, Italy. He was asked to report for a physical examination by the United States Army at Leghorn, Italy, and he passed this examination, but was deferred from military service because he was employed in an organization engaged in the NATO defense program. He later received a letter from the United States Selective Service declaring that, due to the loss of his American citizenship, he had no further obligations for military service.

Appellee brought this action for declaratory and injunctive relief against the operation of Section 301(b) on the ground that its provision for loss of citizenship is unconstitutional. A three-judge District Court granted his motion for summary judgment, declaring the statute void and confirming his continued American citizenship.

## Summary of Argument

This Court has held that American citizens may not be deprived of their citizenship without their consent. *Afroyim* v. *Rusk*, 387 U. S. 253 (1967). It is true that this case involved a naturalized American, but there is no reason in law or policy to deny the same rights to foreign-born Americans. There is no doubt that Section 301(b) is a provision for involuntary expatriation. To require that a foreign-born citizen who wants to keep his citizenship must alter his established pattern of life and be physically present for five years in the United States does not leave the citizen a free choice. It constitutes that very deprivation of liberty without due process of law which is forbidden by the Fifth Amendment. Foreign-born Americans have the same constitutional right enjoyed by naturalized Americans to be free from a residence requirement which "drastically limits their rights to live and work abroad in a way that other citizens may". *Schneider* v. *Rusk*, 377 U. S. 163, 168-169 (1963).

Even if this provision for involuntary expatriation of foreign-born Americans is not held *ipso facto* unconstitutional, it violates the due process clause of the Fifth Amendment because it is unreasonable. The deprivation of liberty which the Section imposes on foreign-born Americans is a serious one and is not redeemed by the fulfillment of any valid national interest.

The concept that a person must be resident in the United States to demonstrate his identification with and allegiance to this country has never been accepted by our nation. Even if one were to grant, which we do not, that the residence requirement inserted into the law in 1934 for the foreign-born children of one citizen-parent had a reasonable basis at that time, it has been rendered obsolete by the subsequent revolution in world transportation and communications and by the transformation in America's world role. In the past forty years, the number of Americans resident abroad has grown from 100,000 to approx-

imately 2,000,000 (half that number if military personnel are excluded). There are large American communities with their own schools, churches and social clubs in most major cities of the world, and it cannot be seriously maintained that foreign-born Americans who grow up overseas necessarily lose touch with their American heritage. The child of one American citizen-parent growing up abroad has the same opportunity to maintain his American identity as the child of two citizen-parents and, in many cases, he and his parents wish that he do so.

These bi-cultural progeny of Americans overseas can render valuable service to their country working in United States Government agencies, business firms, educational institutions and international agencies. Rather than expatriate them against their will, we should welcome them as a national asset in an interdependent world.

## ARGUMENT

### I. Section 301(b) exceeds the power of Congress because it deprives Americans of their citizenship without their consent.

#### A. This Court has held that American citizens are constitutionally protected against involuntary expatriation.

This Court has already held that an American citizen may not be deprived of his citizenship without his consent.[1] In *Schneider* v. *Rusk*, 377 U. S. 163 (1963), the Court struck down a statutory provision declaring that a naturalized American loses his citizenship by three years' residence in his country of origin. In *Afroyim* v. *Rusk*, 387 U. S. 253 (1967), the Court held that Congress lacked

[1] One limited exception to this principle is the expatriation of a naturalized American who obtained his citizenship by fraud. This is clearly distinguishable from other kinds of involuntary expatriation because the person being deprived of citizenship obtained it through illegal means; he was not entitled to have it in the first place.

power to deprive a naturalized citizen of his citizenship because he voted in a foreign election. In the words of the opinion in *Afroyim*, "this Court has consistently invalidated on a case-by-case basis various other statutory sections providing for involuntary expatriation. It has done so on various grounds and has refused to hold that citizens can be expatriated without their voluntary renunciation of citizenship" (pp. 255-256).

The reasoning of the Court in *Schneider* was succinctly summarized as follows (pp. 168-169):

> "This statute proceeds on the impermissible assumption that naturalized citizens as a class are less reliable and bear less allegiance to this country than do the native born. This is an assumption that is impossible for us to make. Moreover, while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' *Bolling* v. *Sharpe*, 347 U. S. 497, 499. A native-born citizen is free to reside abroad indefinitely without suffering loss of citizenship. The discrimination aimed at naturalized citizens drastically limits their rights to live and work abroad in a way that other citizens may. It creates indeed a second-class citizenship. Living abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance. It may indeed be compelled by family, business, or other legitimate reasons."

**B. The citizenship of foreign-born Americans enjoys no less constitutional protection than that of native-born and naturalized Americans.**

In an attempt to narrow the scope of the *Schneider* and *Afroyim* decisions, appellant argues that only "Fourteenth Amendment Citizens"—citizens born in the United

States or naturalized Americans—and not foreign-born Americans, are secure against involuntary loss of nationality.

The asserted distinction is without foundation. The fact that the citizenship of native-born and naturalized Americans is specified in the Fourteenth Amendment and the citizenship of persons born abroad of American parentage is conferred by statute provides no basis for holding that the latter class of citizens do not enjoy the same constitutional protection. The Fourteenth Amendment specifies that certain persons shall be citizens, but it is the Fifth Amendment, not the Fourteenth, which lays down the standards which the Federal Government must observe in the treatment of its citizens. The Fifth Amendment makes no distinction between the rights of Americans born or naturalized here and those born overseas. The *Schneider* opinion, in the language quoted above, clearly states that naturalized Americans have the same Fifth Amendment rights as native-born Americans. There is no justification for concluding that foreign-born Americans do not have these same rights. It would be anomalous indeed if a citizen born abroad of parents, one or both of whom were Americans, were held to have rights under the Constitution inferior to those of a naturalized American. In fact, the *Schneider* and *Afroyim* cases clearly reject any concept of "second-class citizenship." And we read *Afroyim* as holding that Congress has no power whatever to expatriate any citizen against his will.

That the citizenship of all American citizens—native-born, naturalized and foreign-born—stands upon the same footing becomes apparent when the matter is set in historical perspective. The Constitution, as has frequently been pointed out, did not define who were American citizens and who were not. It merely gave Congress authority in Article I, Section 8, Clause 4, to "establish a uniform rule of naturalization." Whether the power of Congress to

regulate citizenship derives from this provision or from other provisions of the Constitution is uncertain; for the purpose of this case, it does not matter. The point is that the Congressional power to regulate citizenship derives from the Constitution and is subject to Constitutional safeguards—including those in the Fifth Amendment.

In the absence of a provision in the original Constitution determining who were citizens of the United States, the Congress proceeded to enact legislation defining citizenship. In its very first enactment in this area, Congress granted citizenship to children born abroad of American parents as well as to those going through the naturalization process (Act of March 26, 1790, 1 Stat. 103). There is nothing in the early history of the United States to suggest that persons born abroad of American parents were regarded as enjoying less in the way of constitutional rights than other Americans. Drawing on the practice of Great Britain, the United States from the very beginning included citizens *jure sanguinis* as well as *jure soli*—and accorded full rights of citizenship to both.

It was not until 1868 that provisions defining American citizenship were written into the Constitution itself in the Fourteenth Amendment. Section 1 states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and or the State wherein they reside." The purpose of this provision was a very specific one—to safeguard the liberties of Negro Americans by giving them the status of citizens. In the words of this Court in *Afroyim* (p. 262), "when the Fourteenth Amendment passed the House without containing any definition of citizenship, the sponsors of the Amendment in the Senate insisted on inserting a constitutional definition and grant of citizenship. They expressed fears that the citizenship so recently conferred on Negroes by the Civil Rights Act cou'd be just as easily taken away from them by subsequent Congresses, and it

was to provide an insuperable obstacle against every governmental effort to strip Negroes of their newly acquired citizenship that the first clause was added to the Fourteenth Amendment."

Since at that time there were doubtless no Negro Americans overseas the Amendment contained no reference to foreign-born Americans. From this omission we can scarcely infer a purpose to establish privileged categories of American citizenship—to give rights to native-born and naturalized Americans not enjoyed by those born abroad. There is nothing in the history of the Fourteenth Amendment to suggest that it was designed to create safeguards against involuntary expatriation for certain Americans and to deny these safeguards to other Americans.

In short, the Fourteenth Amendment left American citizens—whatever the source of their citizenship—in exactly the same position with respect to Federal power as they were theretofore, namely, protected by the due process provisions of the Fifth Amendment as well as other applicable constitutional provisions. It could hardly be otherwise. If, contrary to this reasoning, the Fourteenth Amendment itself were held to be the source of due process guarantees against involuntary expatriation by the Federal Government, then American citizens must have been without safeguards against involuntary expatriation for the first eighty years of the Republic.

Such a conclusion is not only dubious on its face, it is inconsistent with the trend of legislative debate and judicial authority between the founding of the Republic and the adoption of the Fourteenth Amendment. Three separate times, in 1794, 1797 and 1818, the Congress considered and then rejected legislation that would have recognized the right to voluntary expatriation. It also considered a Constitutional amendment, never ratified, that would have provided for loss of citizenship of a person accepting an office or emolument from a foreign government. The op-

ponents of the legislation providing for voluntary expatriation argued that Congress had no constitutional authority to provide for expatriation of any kind—voluntary or involuntary—and the fact that an amendment to the Constitution was drafted to provide for involuntary expatriation would seem to confirm that view, at least so far as involuntary expatriation is concerned. Although these inferences from the early history of our country are admittedly not decisive of the matter, they do receive important support from the dictum of Chief Justice Marshall in *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 827 (1824), to the effect that once a person becomes an American citizen he cannot be deprived by Congress of that status:

> " '[The naturalized citizen] becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature is, to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual.' "

This interpretation of the early history of our country, of course, is hardly original. This Court undertook a similar historical review in *Afroyim* v. *Rusk,* and concluded (p. 257):

> "First we reject the idea expressed in *Perez* that, aside from the Fourteenth Amendment, Congress has any general power, express or implied, to take away an American citizen's citizenship without his assent. This power cannot, as *Perez* indicated, be sustained as an implied attribute of sovereignty possessed by all nations. Other nations are governed by their own constitutions, if any, and we can draw no support

from theirs. In our country the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship. Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. The Constitution, of course, grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power. And even before the adoption of the Fourteenth Amendment, views were expressed in Congress and by this Court that under the Constitution the Government was granted no power, even under its express power to pass a uniform rule of naturalization, to determine what conduct should and should not result in the loss of citizenship."

The conclusion that American citizens born abroad enjoy the same protection against involuntary expatriation as other Americans is supported not only by history but by considerations of equity and common sense. If the view asserted by Appellant were accepted and the constitutionality of Section 301(b) sustained, it would mean that a child born in the United States of two visiting aliens can return with them to their native land and be an American for the rest of his life without any further presence in this country—that a child who becomes an American citizen through the naturalization of his parents can return with them to their native land and be an American for the rest of his life without any further presence in this country—but that a child born abroad of an American father or mother is deprived of his American citizenship unless he returns to this country for five years of physical presence between the ages of fourteen and twenty-eight. It would also mean that American children born abroad of

two American citizens could have their citizenship taken away from them by the enactments of some future Congress.

Such a distinction based solely upon the source of citizenship would be manifestly unfair and would serve no conceivable social policy. There is no magical alchemy of good citizenship worked on an infant child as a result of spending its first few days on American soil that should give it such an advantage over a child born of American parents overseas. Indeed, the child of an American parent nurtured overseas in a home where English is spoken and things American deeply valued will have ties to the United States at least as close as, for example, the child of aliens who happens to be born in the United States but who grows up abroad speaking no English and with no further contact with this country. Congress recognized this fact for years when it permitted the passage of American citizenship to children born abroad of American fathers without any requirement of residence in the United States, in accordance with Section 1993 of the Revised Statutes, before its amendment in 1934.

Appellant seeks to justify the involuntary expatriation of foreign-born Americans by arguing that since Congress has the power to establish a five-year residence requirement as a condition precedent to the acquisition of citizenship for persons born abroad of one citizen-parent it must also have the power to take away American citizenship from such persons for failing to comply with the residence requirement. The premise is correct, but the conclusion does not follow. To lay down a condition which a person must comply with before he becomes a citizen is one thing; to take away a person's citizenship for failing to comply with a condition is another. No issue is made here of the constitutionality of the requirement that the child born abroad of one American citizen-parent is born an American citizen only if the citizen-parent previously was phys-

ically present for ten years in the United States. 8 U.S.C., §1401(a)(7).

To be born an American citizen is almost universally recognized to be a valuable privilege. It is part and parcel of the citizen's image and world-view; he is "psychologically American". To deprive that person of his citizenship without his consent may be to subject him to a serious emotional and psychological deprivation. Involuntary expatriation, of course, works more tangible hardships. American citizenship is a practical asset. To take just two examples, it carries with it a right to United States diplomatic protection and access to certain kinds of employment denied to non-Americans. American citizenship also imposes certain obligations, among them the obligation of military service and a liability to American taxation and judicial process not borne by non-Americans. After enjoying these rights and accepting these obligations for twenty-three years (including the obligation of military service, for which he took a physical examination in Italy), Appellee is told his citizenship is abruptly withdrawn. A right is thus taken away which Appellee not only values highly but which he has paid for by his willingness to accept the obligations of citizenship for more than two decades. It is precisely the injustice of this situation that distinguishes the involuntary deprivation of citizenship already granted from the setting of conditions precedent to the acquisition of citizenship.

There is another fundamental reason for the distinction. This is the concern, reflected in the recent opinions of this Court, that if involuntary expatriation is permitted for one purpose it would open the door to involuntary expatriation for other purposes, thus providing a back-door device for undermining the fundamental liberties which the Constitution guarantees to all Americans. As the Court said in *Afroyim* (p. 268): "The very nature of our free government makes it completely incongruous to have

a rule of law under which a group of citizens temporarily in office can deprive another group of citizens of their citizenship". See *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144 (1963), where this Court, by a divided vote, held that it was beyond the power of Congress to strip an American of his citizenship automatically and without prior judicial or administrative proceeding because he left the United States in time of war to avoid military service, thus depriving him of the procedural safeguards of the Fifth and Sixth Amendments. Even Justice Stewart, dissenting on the grounds that flight to avoid military service was a manifestation of non-allegiance, noted his concern that the withdrawal of citizenship had to be strictly limited: "Withdrawal of citizenship is a drastic measure. Moreover, the power to expatriate endows government with authority to define and to limit the society which it represents and to which it is responsible". 372 U. S. 144 at 214. See also *Trop* v. *Dulles*, 356 U. S. 86, at 92-93 (1958).

### C. Section 301(b) is a provision for involuntary expatriation.

Appellant seeks to treat Section 301(b) as if it were merely a provision for the voluntary relinquishment of citizenship. It is argued that Appellee's failure to abide by the five-year residence requirement amounts to "voluntary" renunciation of citizenship. But such an interpretation alters the meaning of "voluntary" beyond recognition. The fact is that Appellee does *not* want to abandon his American citizenship. To say that he can retain his citizenship only by residing for five years in the United States does not leave him a free choice. For Appellee, and for thousands of others similarly situated, the requirement of five years of residence in the United States between the ages of fourteen and twenty-eight may impose serious hardships—expenses beyond his capacity to bear, enforced separation from his family and loved ones, the sacrifice of a valuable job or the postponement of a

preferred career. If this Court had accepted this argument of Appellant, it would no doubt have held that Angelika Schneider was not involuntarily expatriated because she could have retained her citizenship by not returning to Germany, and it would have held that Mr. Afroyim voluntarily relinquished his citizenship by voting in Israel. In fact, the Court rejected this argument by finding that the statutory residence requirement for naturalized Americans "drastically limits their rights to live and work abroad in a way that other citizens may." *Schneider* v. *Rusk*, 377 U. S. 163, 168-169. A requirement that dual nationals choose between American and foreign citizenship by a simple oral or written statement might raise no constitutional problem, but the residence requirement in the present case, no less than the residence requirement in the *Schneider* case, by forcing an American citizen to choose between loss of citizenship and disruption of his preferred pattern of life, constitutes that very deprivation of liberty without due process of law which is forbidden by the Fifth Amendment.

## II. Section 301(b) violates the due process clause of the Fifth Amendment because it is unreasonable.

For the reasons set out above, we believe that the Fifth Amendment prohibits the involuntary expatriation of foreign-born as well as native-born and naturalized Americans and that Section 301(b) is unconstitutional on this ground alone. If, however, this Court is not prepared to hold that Congress has no power of involuntary expatriation, we believe it should find that the Section violates the due process clause of the Fifth Amendment because it is unreasonable. Appellant's brief concedes that the constitutionality of Section 301(b) cannot be sustained unless it is a reasonable regulation.

This Court noted in the *Schneider* case that "while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' *Bolling* v. *Sharpe*, 347 U. S. 497, 499." 377 U. S. 163, 168. The question, then, is whether discrimination against foreign-born Americans, subjecting them to a residence requirement not imposed on other Americans, is justifiable or reasonable within the terms of the Fifth Amendment.

There is no simple formula that will yield an answer to this question. What is involved, of course, is a matter of judgment, weighing the deprivation of liberty which the Section imposes on foreign-born Americans against the benefits, if any, which the Section yields in terms of legitimate national interests. We submit that when the question is looked at in this way, the Section fails to meet the test of reasonableness, for it imposes a serious deprivation of liberty which is not redeemed by the achievement of any valid social purpose in the drastically altered world conditions in which we find ourselves today. Indeed, there is reason to believe that the Section is actually counterproductive in terms of the national interest.

### A. Section 301(b) imposes a serious deprivation of liberty.

Appellant seeks to create the impression that the requirement of five years' physical presence between the ages of 14 and 28 is one that can be complied with without serious inconvenience. For large numbers of foreign-born Americans, this is not so. At 14, the foreign-born child of mixed parentage is normally enrolled in a high school overseas which he does not finish until he is 17 or 18 (18 or 19 if the school is a European-style lycée or Gymnasium). To withdraw the child in the middle of his high school education and send him back to the United States to start in a new school separated from his parents would not only be a

hardship for the entire family—financially and emotionally; quite possibly, it could be harmful to the child from an educational point of view.

The most rational way to satisfy the residence requirement might appear to be through pursuing University education in the United States. But the cost of such education is now extremely high; when room and board and spending money as well as tuition are included, it runs to $3,000 or more each year, plus the cost of round trip transportation home during summer vacation ($300-$600, depending on family's place of residence). These costs are beyond the reach of many families of American-born children abroad, particularly when the wife is an American married to an alien living on a foreign pay scale. Moreover, the families here involved have few opportunities to limit these costs: there is often no one in the United States with whom the children can live while at the University; United States government travel grants are available only for foreign students; not being residents of any state the children often have difficulty getting places in tuition-free state Universities or finding scholarship aid. When two or more children are involved the possibility of sending all to United States universities becomes even more remote. Indeed, in a very real sense the Section is discriminatory because it bears with particular severity on children of poor and middle-income families.

For foreign-born children in the situation described above the opportunity to satisfy the residence requirement arises, therefore, after University education overseas has been completed. This means after the age of 21 or 22. But at this stage the most attractive, perhaps the only, possibilities for productive employment (or post-graduate study and research) may be overseas. There may be personal as well as professional reasons for remaining abroad —a fiancé, a circle of friends, parents and relations, or simply the desire to remain in the familiar environment in

which the child grew up. In these circumstances to tell the foreign-born American that he must return for five years' residence is to impose upon him an agonizing choice.

It is not contended, of course, that all, or even a large majority of foreign-born Americans find it so difficult to satisfy the residence requirement. But many of them do. And for certain individuals the burden—financially, professionally, emotionally—is so severe as to constitute a serious deprivation of liberty within the meaning of the Fifth Amendment.

**B. Section 301(b) serves no rational public policy in the changed circumstances of today.**

Appellant argues that Section 301(b) serves a rational public policy because it assures that the beneficiary of citizenship status will "demonstrate, in a reasonable manner, his identification with and allegiance to this country" (Brief, p. 20). As we noted earlier, no such residence requirement is imposed upon the American-born children of alien parents or the children of naturalized Americans in order to demonstrate their "identification with and allegiance to" this country. What rational policy is served by imposing this requirement on the foreign-born American? We submit that there is none.

The concept that a person must be resident in our country to demonstrate his identification with and allegiance to it has never been accepted by our nation. As we noted earlier, the United States from the earliest days granted citizenship to children born abroad of two American parents with no residence requirement at all. For years we granted citizenship to children born abroad of American fathers without a residence requirement. It was only when Congress liberalized the law to permit the passage of citizenship abroad through an American mother that the residence requirement for foreign-born Americans was imposed. This was apparently based on the assumption

that the foreign-born children of American mothers were somehow less likely to be good citizens than the foreign-born children of American fathers—a dubious assumption at best, since a mother's influence on a child is at least as great as that of its father. And no residence requirement has ever been imposed on children born in the United States—even of alien parents.

Whatever validity the residence requirement may have had as a test of allegiance and identification for foreign-born children of one citizen-parent when it was originally inserted, it has no validity today. The circumstances of 1970 are not those of 1934. The revolution in transportation and communication has rendered obsolete whatever validity may have once attached to residence as a test of allegiance. In a world of jet aircraft, of television via satellite, of unprecedented economic, political and cultural interdependence, with large numbers of persons serving their governments and private institutions overseas, the fact of residence in one country does not necessarily imply allegiance to that country or preclude allegiance to the country of which they are citizens.

This is particularly true today of Americans overseas. In the last 40 years the position of the United States in the world has changed beyond recognition. Then we were inward-looking, isolationist, still preoccupied with establishing a national identity out of millions of new immigrants, perhaps unsure of the capacity of our culture to withstand competition with foreign cultures. Today we are a global power and our presence is felt in almost every corner of the world. There is no longer any basis for the view that an American citizen residing abroad will necessarily have his national cultural background obliterated by foreign cultures. To the contrary, the cultural influence of the United States is too strong to be ignored by any one—including its own citizens. Americans residing abroad, whether married to an American or not, are unquestion-

ably able to transmit their language, culture and national outlook to their children, just as if they were residing in the United States. Indeed, in the principal cities of the world where most of the overseas Americans are resident, their children not only can (and usually do) attend American schools, churches and social clubs, but also absorb the other aspects of American society—American movies and TV programs (standard fare in foreign cinemas and TV networks), chewing gum, coca cola, blue jeans, baseball, and rock music.

Indeed, there are large pieces of America in most of the cities of the world today. The reasons are obvious, but they are made more graphic by a few statistics. In 1900 the number of Americans residing abroad was 91,219. In 1930 it was 89,453. In 1940 it was 118,933. By 1950 the number had grown to 481,545 and by 1960 to 1,372,066. Rubin, "A Statistical Overview of Americans Abroad," in *Americans Abroad, Annals of the American Academy of Political and Social Science* (November, 1966, p. 2). According to information received on December 24, 1969 from the Office of the Under Secretary of State for Administration, based on U. S. consular records, there are now about 940,000 non-military U. S. citizens overseas plus 92,500 U. S. civilian government employees and their dependents. When to these figures there are added U. S. military forces abroad the total U. S. population resident overseas is close to 2 million.

Paradoxically, the problem attendant upon this development that has preoccupied many observers has not been that this vast overseas population has lost its American identity but that, on the contrary, it has preserved it so successfully as to pose major political and cultural problems for the host countries. One authoritative survey of postwar developments puts the matter as follows:

> "Europe soon had a fluctuating population of around a million Americans, and the number of these tempo-

rary or semipermanent residents swelled every summer by still another million eager tourists. Their impact caused growing concern over the possibly dire consequences of what their hosts fearfully called the Americanization of Europe.

As families were able to join army men stationed abroad and thousands of government officials on relief projects took off for Europe, small American communities grew up whose 'Stateside' standards of living cut them off almost completely from the country in which they were situated. With little or no interest in learning a foreign language and all facilities provided them, these unwilling residents abroad transferred suburbia across the Atlantic—its schools, churches, supermarkets, moving picture theaters, and country clubs. They were prepared to accept Europe only so far as it did not mean any real change in their own way of life."

Foster Rhea Dulles, "A Historical View of Americans Abroad," *id.* at p. 11.

One preoccupation of the Congress when it drafted Section 301(b) may have been that the foreign-born American child might not have an American education and might not even know the English language. But one of the central preoccupations of the vast array of Americans overseas has been to provide an American education for their children. The International Schools Services has compiled a list of 319 American primary and secondary schools abroad in cities from Abu Dhabi to Zugerberg. (This is not counting the hundreds of schools maintained overseas by the U. S. military establishment.) There are 27 of these schools in Switzerland alone, 14 in Italy, 11 in Mexico, 8 in Nigeria and 7 in India. There are in addition a number of excellent institutions of higher learning following American curricula such as the American College of Switzerland, the American College in Paris, the Schiller College in Ger-

many, the American College in Jerusalem and the University of the Americas in Mexico City, not to mention American universities established primarily for the education of foreign nationals such as the American University of Beirut. Of the situation in Europe, where most of the Americans residing abroad are located (apart from our military forces), one observer noted:

> "Keeping the kids American in Europe, however, especially if they go to an American school, is no problem. In fact some American children abroad (like most U. S. Army and Air Force children in Europe) have little enough real exposure to the country in which they live. They study a European language four hours per week in school, ride European buses, read European signs, tramp European sidewalks. But their study time, leisure time, playmates, and preoccupations are twice-distilled American. Many return home virtually untouched by life abroad and speaking no new language. There are exceptions. Depending on location, their own age and personalities, and their parents' attitudes, children can pick up both the language and the 'feel' of a country and its thought patterns. When they return home to high schools or colleges these youngsters will merge into the American scene."
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> Creary, *The Americanization of Europe* (New York, 1964), pp. 242-243.

It is true, of course, that the arguments above have their greatest force with regard to children whose parents are both American citizens. But they also show that the possibilities for an American education or at least a strong American identification may also be great for the child of an American father or mother who is married to an alien. Certainly, there is no basis for assuming that the child of only one citizen-parent is destined to lose his American

identity. Indeed, there is ample evidence to the contrary. Some 350 American women in Paris formed "The Association of American Wives of Europeans", *Amicus curiae* herein, precisely in order to maintain a rich American heritage for their children. Considering themselves "the unofficial representatives abroad of their native land," these women organized English reading classes for their children, lectures on American topics, and celebrations of American holidays. A survey conducted by this organization of 25 families with American wives and European husbands showed that all the mothers spoke English and all but 2 of the fathers did the same. More important, 26 of the 47 children of these families either spoke English as the primary language or spoke English and French with equal fluency. Only 5 of the children spoke only French. Metraux, "A Study of Bilingualism Among Children of U. S.-French Parents," *The French Review,* Vol. XXXVIII, No. 5 (April, 1965). This organization estimates that there are some 6,000 to 8,000 American women around the world married to foreign husbands. There is every reason to believe that many of them are just as intent to preserve the American heritage of their children.

Even if Americans with children growing up abroad were not determined to pass on their American cultural heritage, American culture is now so pervasive that American children overseas would be likely to absorb its essential features. Indeed, the old concept of the rigid separation of cultures is no longer valid. American culture is intermingling with foreign cultures. In almost every major city of the world, American newspapers, American TV, American films, American business organizations, American schools and, most important of all, American ideas are a major influence:

> "(O)n European television U. S. Westerns and private eyes are the most popular programs. For better or worse, American movies, now as before, are

a major mass opiate or mass stimulation which, in the process of entertainment, conveys American attitudes, values, and styles—or at least those borne by television and theater films. . . . U. S. books, in English and in translation, are common. . . . In Amsterdam, over a bottle of the fierce local gin, two sculptors and a painter debate the undue influence the New York Museum of Modern Art exerts on their world. . . . In Brussels, meanwhile, where the Common Market headquarters is established, the Common Market Commission's regulations are modeled on U. S. antitrust thinking and experience. . . . It is all of the above, along with the spread of jukeboxes and ducktail haircuts, that Europeans and Americans refer to when they speak of the Americanization of Europe. . . . The thing to note is that in America youngsters in changing Europe most readily find behavioral patterns and postures they want."

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"Today, when new technology can cross the Atlantic in some six months to a year, an armored division in sixty hours, a new joke in twenty-four hours, and a guided missile in half an hour, more and more Europeans are discovering that parts of the once distant American dream are no dream at all—they are everyday reality in Europe. This is awakening the Europeans to just how much they, while remaining themselves, are changing, becoming part of what is now a joint American-European experiment."

Creary, *op. cit.*, pp. 250-251, 256, 262.

**C. The Americans involuntarily expatriated by Section 301(b) are a valuable national asset.**

Section 301(b) is a provision that might be satisfactory for Guatemala, Nepal and Korea. It might even be con-

ceivable for Mexico, Norway or Pakistan. It is not appropriate for a global power like the United States, which needs citizens who have the desire and the ability to work abroad. It is no accident that the two other Western countries that in our time have played a global role—Britain and France—do not have residence requirements of any kind for foreign-born children of one citizen-parent.

The United States now maintains diplomatic relations with over one hundred foreign countries. We are members of more than seventy international organizations. We give military or economic assistance to over fifty foreign countries. Our business firms have more than $100 billion invested abroad. We need qualified people to represent our government and our private organizations in these and other relationships.

Some of the best qualified are precisely the American children born abroad of one citizen-parent affected by Section 301(b). While retaining a strong American identity, they are usually bilingual, with a particular capacity to operate effectively in a foreign environment. They have precisely the "cross-cultural" facility that is essential to effective United States operations overseas. This is a facility that is hard to teach and one that our country has often found in short supply. See Cleveland and Mangone, *The Art of Overseamanship* (1957). Moreover, quite apart from their special skills, the overseas American children are likely to constitute a highly desirable segment of the population:

> "On the basis of data available from the 1960 Census it is quite apparent that Americans overseas constitute a very special segment of the parent population. The overseas group is, on the whole, younger, better educated, and probably more remuneratively employed than the national population." Rubin, "A Statistical Overview of Americans Abroad." *op. cit.*, p. 9.

The number of cases where hardship is worked by Section 301(b) is destined to grow with the increase in the number of Americans born abroad of mixed parentage. In each of these cases the residence requirement not only hurts the individuals involved; it serves no rational public policy, because the persons affected by it are tied strongly to the United States by family background and education. Moreover, they are uniquely qualified to serve United States interests in United States companies abroad, in United States government programs and in international agencies and are frustrated in their desire to do so by an obsolete provision conceived in an era when such companies, programs and agencies were few or non-existent.

It is time to bring American law and policy into line with current needs as well as constitutional requirements. America needs its bicultural progeny overseas. Rather than expatriate them against their will or deny them the same rights as other citizens, we should recognize them for what they are—a valuable national asset in an increasingly interdependent world.

## CONCLUSION

**The judgment of the District Court should be affirmed.**

Respectfully submitted,

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1970

No. 24

WILLIAM P. ROGERS, Secretary of State,

Appellant,

vs.

ALDO MARIO BELLEI

---

On Appeal from the United States District Court for the District of Columbia

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# AMICUS CURIAE BRIEF OF JAMES SINCLAIR

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Amicus Curiae

## TOPICAL INDEX

## TABLE OF AUTHORITIES

Statutes

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UNITED STATES

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# AMICUS CURIAE BRIEF OF JAMES SINCLAIR

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## INTEREST OF AMICUS CURIAE

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The argument of the Appellee, if successful, will create a horde of dual citizens which will

burden our nation, and there is a remote possibility of escalation to nuclear war in these troubled times if someone makes a political miscalculation about responsibility for one of these citizens. Beyond this general interest, amicus has a special interest in the upholding of Congressional and Treaty powers reasonably to regulate dual citizenship: present litigation as to his marital status has raised a question of citizenship depending upon the expatriating constitutionality of a treaty and a statute.

## ARGUMENT

### I

### UNITED STATES CITIZENSHIP OF A DUAL NATIONAL IS NOT PROTECTED BY THE FOURTEENTH AMENDMENT

Appellee Bellei claims that no citizen's citizenship can be taken away without his explicit consent, relying on Afroyim v. Rusk, 387 U.S. 253 (1967) where it was held that the United States cannot terminate citizenship, but that a citizen has to make an express renunciation of United States citizenship. (Mr. Afroyim was a dual national: 387 U.S. 253, 270.) The court below so thought, holding that once Congress gave appellee a conditional citizenship, it was converted by Afroyim into an unconditional citizenship:

"We hold only that Congress may not proceed by granting citizenship, and then either qualifying the grant by creating a second class citizenship or terminating the grant. The broad teaching of Afroyim and Schneider is that once American citizenship has been recognized or conferred, Congress may not remove the status; it is for the citizen to abandon his citizenship voluntarily."

Bellei v. Rusk,
296 F. Supp. 1247, 1252.

Thus a citizen can take on a new nationality by swearing allegiance and retain United States citizenship if he does not, in front of a State Department official, sign a renunciation of United States citizenship. He might even take on numerous simultaneous nationalities, under Afroyim.

Amicus curiae solemnly contends that such is not the law, and if that is what Afroyim stands for, Afroyim was wrongly decided and must be overruled.

Amicus curiae contends that Appellee should have effectively elected a single citizenship upon majority and done whatever necessary to shed the other. See Appellant's Brief, pp. 21-26.

Amicus curiae contends that acquiring citizenship or suffering native citizenship in any other nation is incompatible with United States citizenship and allegiance. And it is in the power of the United States government to define and recognize such other allegiance after majority as an implied voluntary expatriation (by regulation consistent with the due process clause of the Fifth Amendment as interpreted by this Court to protect against unreasonable expatriation by "a group of citizens temporarily in office;" Afroyim v. Rusk, 387 U.S. at 268). It is not that appellee "resided in a foreign country," but that he failed to show an undivided allegiance when reasonably required to do so.

The same "group of citizens" could as easily expatriate by enacting a death penalty for temporarily unpopular acts. And this Court would meet the issue, remote as it is, by a carefully reasoned limited nullification under constitutional due process requirements or the Eighth Amendment, etc.

The policy of the Court has been to avoid impairing the reasonable and necessary powers of the executive and legislative branches of government by announcing constitutional interpretations no broader than necessary to decide the controversy before it (Communist Party v. Control Board, 367 U.S. 1, 72). There was no need to go beyond the Fifth and Eighth Amendments to read into the Fourteenth anything beyond what establishes citizenship.

It appears the Afroyim decision has been stated in too broad terms, in fact was wrong in declaring an unbridled citizenship under the Fourteenth Amendment. Four members of the Court dissented; amicus curiae contends they were correct. The history of the Fourteenth Amendment shows no such unbridled grant of citizenship as the majority of that Court announced (also, p. 9, amicus curiae brief of the American Bar Association herein).

In addition to the capable history stated by the dissent, only four years after the exact clause at issue of the Fourteenth Amendment was proposed by the Senate itself, a Treaty was unanimously ratified in the same Senate which expatriated citizens who became naturalized as British subjects (16 U. S. Stat. 775; p. 514, Executive Journal of the Senate, July 8, 1870).

A treaty is entitled to profound respect, nearly coordinate with the Constitution, and the Constitution interpreted as being in contradiction only in the clearest cases. Missouri v. Holland, 252 U. S. 416, 433-34; U. S. v. Reid, 73 F. 2d 153. The very purpose of the union of the States was to provide a more effective power in foreign affairs by union. Therefore the Fourteenth Amendment was not intended by its framers to prevent expatriation in situations of dual allegiance.

Afroyim v. Rusk was an erroneously conceived, and unnecessary, usurpation of the powers of the Congress.

## II

## EVILS OF A CONTRARY DECISION

If appellee is found here to be a United States citizen, there is created a horde of dual nationals with vested permanent absentee United States citizenship, all those persons previously expatriated for lack of residence in the United States, including those who before never even troubled to inform the Department of State of their parentage. Anytime in their lifetime they may claim the benefits of 22 U.S.C. 1732. Zemel v. Rusk, 381 U.S. 1, 15. No one is going to get them to sign a renunciation, and, under Afroyim, there is no other way to end their citizenship.

Then, because of their affinity and numbers, it is quite likely that they will produce, nay, have already produced, a second generation of vested citizens claiming under both parents, not mentioning those claiming under a single parent. Does one say the statute requires residence in the United States of one of the parents to transmit citizenship to one born abroad? If one says that a citizen living his whole life abroad cannot transmit citizenship abroad just as well as a

citizen who limited his right to live abroad by staying the required time in the United States, one is saying that his citizenship is "second class," limiting "their rights to live and work abroad in a way that other citizens may" (Schneider v. Rusk, 377 U.S. 163, 168-9; in which case the Court also mentioned that the citizenship of Mrs. Schneider's sons born abroad turned on hers, p. 164). One may expect an attack on the condition in the statute for "discrimination that is so unjustifiable as to be violative of due process," possibly by amicus curiae American Bar Association for the grandchild of two members of amicus curiae Association of American Wives of Europeans, as evidenced by their Brief herein.

Foreign countries could actually force us to accept these citizens and place them in orphanages or on public relief. As citizens, they could not be denied entry.

In any event, we have the great burden of protecting a dual national in the country of his other nationality. We cannot change the law so as to discriminate between two classes of United States citizens without risking a violation of due process. The dual national most needs protection and is the class of citizen most likely to be found in that country.

Appellant's Brief (p. 27) notes that the policy of our government was once to protect dual nationals from forced military service in the other country for three years until they

became 21.

The United States came near to war over dual nationality before the 1870 Treaty with Great Britain (overlooking the wars of 1776 and 1812). Americans returning to Ireland requested protection and in sympathy Irishmen in the United States rioted and threatened Canada with invasion. Finally England changed its centuries-old citizenship law and signed the Treaty recognizing the right of expatriation. Can one imagine the excesses thatpublic opinion might drive our government to in order to protect dual nationals if the Russians help Egypt crush Israel? Nuclear war could result. Recall that Mr. Afroyim was a dual national. Afroyim v. Rusk, 387 U. S. 253, 270. There has even been a charge that the Egyptians have captured a dual citizen fighting for Israel.

Further, should we say that any foreign born child of a United States citizen, even one who does not take up permanent residence by the age of 23 in the United States, risks being forced to fulfill the duties of United States citizenship if he is caught here as a tourist, can he be imprisoned for failure to file a tax return on his foreign income or for failure to register for the draft or for some act abroad contrary to our national interest such as treason, all because he did not make an election effectively, according to our lights, expatriating himself of our nationality? See Kawakita v. U. S., 343 U. S. 717, note. 18. Mr. Kawakita could have paid with his life for a mistake of dual nationality.

Dual nationals have the tendency to turn into "fair-weather citizens" (Appellant's Brief, p. 22). Appellant Bellei did not register under Selective Service when he became 18, although he had previously travelled to the United States three times on United States passports, the last time on his own passport. He finally registered in his 20th year (Appellee's Brief, p. 3). He was warned by the passport office he must begin 5 continuous years of United States residence by his 23rd birthday to retain his citizenship, and he did so 4 days before said birthday. During his 23rd year he terminated said residence (despite warning) about the time he was ordered to report for induction. He did not appear to value his citizenship. He was informed he had lost both his citizenship and military obligation after one year abroad. He filed this action after he passed 26 years old.

It must be admitted that his induction report was deferred, apparently because of some defense work he found in Italy. Without knowing all the facts, one can only guess at the possibility that he played both sides of the street: first using United States citizenship to escape Italian military service, and then going to Italy to escape imminent United States military service. Now he wants his citizenship back.

Human nature being what it is, no mere declaration of allegiance can be seen to be as convincing as would have been the 5 years of residence, with military service, taxpaying,

and developing a real feeling of oneness for his country. Since Appellee can do on his present Italian passport what he apparently did on his United States passport, one wonders deeply why he wants to regain citizenship, this statement assuming his several months residence here was no more than a visaed visit.

Amicus curiae contends that the statute assailed by appellee and held unconstitutional below was a reasonable effort by the Congress to recognize appellee's native and continuing allegiance to Italy as incompatible with derivative allegiance to the United States, or equivalent to voluntary expatriation. The statute is a constitutionally reasonable exercise of power to deal with the evils of dual nationality as they exist in the material world. A somewhat different case would have been presented if appellee had fulfilled the requirements of renouncing Italian citizenship while off Italian soil and while adult. The Fourteenth Amendment does not apply to either case, only the Fifth Amendment applies as citizenship is subject to reasonable conditions against dilution of allegiance. As the right to interstate travel is certain although it is not possible for all to agree on where it is secured in the Constitution; so incompatible dual nationality is forbidden, though all cannot agree on a single authority. Indeed the authority for each may be precedent to the Constitution itself.

## CONCLUSION

Dual allegiance is a potential evil which should be subject to reasonable, flexible legislation and decisions instead of being frozen into a constitutional mold. The Court should reverse the judgment in the light of the statute constitutionally requiring residence as a pragmatic indication of election of allegiance.

Respectfully submitted,

JAMES SINCLAIR

Amicus Curiae

September, 1970

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## ROGERS, SECRETARY OF STATE *v.* BELLEI

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 24. Argued January 15, 1970—Reargued November 12, 1970—Decided April 5, 1971

Appellee challenges the constitutionality of § 301 (b) of the Immigration and Nationality Act of 1952, which provides that one who acquires United States citizenship by virtue of having been born abroad to parents, one of whom is an American citizen, who has met certain residence requirements, shall lose his citizenship unless he resides in this country continuously for five years between the ages of 14 and 28. The three-judge District Court held the section unconstitutional, citing *Afroyim* v. *Rusk*, 387 U. S. 253, and *Schneider* v. *Rusk*, 377 U. S. 163. *Held:* Congress has the power to impose the condition subsequent of residence in this country on appellee, who does not come within the Fourteenth Amendment's definition of citizens as those "born or naturalized in the United States," and its imposition is not unreasonable, arbitrary, or unlawful. *Afroyim* v. *Rusk*, *supra*, and *Schneider* v. *Rusk*, *supra*, distinguished. Pp. 5–21.

296 F. Supp. 1247, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, and WHITE, JJ., joined. BLACK, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined.

# SUPREME COURT OF THE UNITED STATES

No. 24.—OCTOBER TERM, 1970

William P. Rogers, Secretary of State, Appellant, *v.* Aldo Mario Bellei. | On Appeal from the United States District Court for the District of Columbia.

[April 5, 1971]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Under constitutional challenge here, primarily on Fifth Amendment due process grounds, but also on Fourteenth Amendment grounds, is § 301 (b) of the Immigration and Nationality Act of June 27, 1952, 66 Stat. 163, 236, 8 U. S. C. § 1401 (b).

Section 301 (a) of the Act, 8 U. S. C. § 1401 (a), defines those persons who "shall be nationals and citizens of the United States at birth." Paragraph (7) of § 301 (a) includes in that definition a person born abroad "of parents one of whom is an alien, and the other a citizen of the United States" who has met specified conditions of residence in this country. Section 301 (b), however, provides that one who is a citizen at birth under § 301 (a)(7) shall lose his citizenship unless, after age 14 and before age 28, he shall come to the United States and be physically present here continuously for at least five years. We quote the statute in the margin.[1]

[1] "Sec. 301. (a) The following shall be nationals and citizens of the United States at birth:

"(1) a person born in the United States, and subject to the jurisdiction thereof;

. . . . . .

"(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States

The plan thus adopted by Congress with respect to a person of this classification was to bestow citizenship at birth but to take it away upon the person's failure to comply with a post-age-14 and pre-age-28 residential requirement. It is this deprival of citizenship, once bestowed, that is under attack here.

## I

The facts are stipulated:

1. The appellee, Aldo Mario Bellei (hereinafter the plaintiff), was born in Italy on December 22, 1939. He is now 31 years of age.

2. The plaintiff's father has always been a citizen of Italy and never has acquired United States citizenship. The plaintiff's mother, however, was born in Philadelphia in 1915 and thus was a native-born United States citizen. She has retained that citizenship. Moreover, she has fulfilled the requirement of § 301 (a)(7) for physical presence in the United States for 10 years, more than five of

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or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years; *Provided* . . . .

"(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[s] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

"(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934 . . . ."

Section 301 (a)(7) was amended November 6, 1966, by Pub. L. 89–770, 80 Stat. 1322, by way of additions to the proviso, omitted above; these have no relevancy here. Pub. L. 85–316, § 16, 71 Stat. 639, 644, 8 U. S. C. § 1401b, enacted in September 1957, provides that absences of less than 12 months in the aggregate "shall not be considered to break the continuity of [the] physical presence" required by § 301 (b).

which were after she attained the age of 14 years. The mother and father were married in Philadelphia on the mother's 24th birthday, March 14, 1939. Nine days later, on March 23, the newlyweds departed for Italy. They have resided there ever since.

3. By Italian law the plaintiff acquired Italian citizenship upon his birth in Italy. He retains that citizenship. He also acquired United States citizenship at his birth under R. S. § 1993, as amended by the act of May 24, 1934, § 1, 48 Stat. 797, then in effect.[2] That version of the statute, as does the present one, contained a residence condition applicable to a child born abroad with one alien parent.

4. The plaintiff resided in Italy from the time of his birth until recently. He currently resides in England, where he has employment as an electronics engineer with an organization engaged in the NATO defense program.

5. The plaintiff has come to the United States five different times. He was physically present here during the following periods:

April 27 to July 31, 1948
July 10 to October 5, 1951
June to October 1955
December 18, 1962 to February 13, 1963
May 26 to June 13, 1965.

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[2] "Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

On the first two occasions, when the plaintiff was a boy of eight and 11, he entered the country with his mother on her United States passport. On the next two occasions, when he was 15 and just under 23, he entered on his own United States passport and was admitted as a citizen of this country. His passport was first issued on June 27, 1952. His last application approval, in August 1961, contains the notation "Warned abt. 301 (b)." The plaintiff's United States passport was periodically approved to and including December 22, 1962, his 23d birthday.

6. On his fifth visit to the United States, in 1965, the plaintiff entered with an Italian passport and as an alien visitor. He had just been married and he came with his bride to visit his maternal grandparents.

7. The plaintiff was warned in writing by United States authorities of the impact of § 301 (b) when he was in this country in January 1963 and again in November of that year when he was in Italy. Sometime after February 11, 1964, he was orally advised by the American Embassy at Rome that he had lost his United States citizenship pursuant to § 301 (b). In November 1966 he was so notified in writing by the American Consul in Rome when the plaintiff requested another American passport.

8. On March 28, 1960, plaintiff registered under the United States Selective Service laws with the American Consul in Rome. At that time he already was 20 years of age. He took in Italy, and passed, a United States Army physical examination. On December 11, 1963, he was asked to report for induction in the District of Columbia. This induction, however, was then deferred because of his NATO defense program employment. At the time of deferment he was warned of the danger of losing his United States citizenship if he did not comply with the residence requirement. After February 14, 1964, Selective Service advised him by letter that, due to the

loss of his citizenship, he had no further obligation for United States military service.

Plaintiff thus concededly failed to comply with the conditions imposed by § 301 (b) of the Act.

## II

The plaintiff instituted the present action against the Secretary of State in the Southern District of New York. He asked that the Secretary be enjoined from carrying out and enforcing § 301 (b), and also requested a declaratory judgment that § 301 (b) is unconstitutional as violative of the Fifth Amendment's Due Process Clause, the Eighth Amendment's Punishment Clause, and the Ninth Amendment, and that he is and always has been a native-born United States citizen. Because, under 28 U. S. C. § 1391 (e), the New York venue was improper, the case was transferred to the District of Columbia. 28 U. S. C. § 1406 (a).

A three-judge District Court was convened. With the facts stipulated, cross motions for summary judgment were filed. The District Court ruled that § 301 (b) was unconstitutional, citing *Afroyim* v. *Rusk*, 387 U. S. 253 (1967), and *Schneider* v. *Rusk*, 377 U. S. 163 (1964), and sustained the plaintiff's summary judgment motion. *Bellei* v. *Rusk*, 396 F. Supp. 1247 (DC 1969). This Court noted probable jurisdiction, *Rogers* v. *Bellei*, 396 U. S. 811 (1969), and, after argument at the 1969 Term, restored the case to the calendar for reargument. 397 U. S. § 1060 (1970).

## III

The two cases primarily relied upon by the three-judge District Court are, of course, of particular significance here.

*Schneider* v. *Rusk*, 377 U. S. 163 (1964). Mrs. Schneider, a German national by birth, acquired United States citizenship derivatively through her mother's nat-

uralization in the United States. She came to this country as a small child with her parents and remained here until she finished college. She then went abroad for graduate work, was engaged to a German national, married in Germany, and stayed in residence there. She declared that she had no intention of returning to the United States. In 1959, a passport was denied by the State Department on the ground that she had lost her United States citizenship under the specific provisions of § 352 (a)(1) of the Immigration and Nationality Act, 8 U. S. C. § 1484 (a)(1), by continuous residence for three years in a foreign state of which she was formerly a national. The Court, by a five-to-three vote, held the statute violative of Fifth Amendment due process because there was no like restriction against foreign residence by native-born citizens.

The dissent (Mr. Justice Clark, joined by JUSTICES HARLAN and WHITE) based its position on what it regarded as the long acceptance of expatriating naturalized citizens who voluntarily return to residence in their native lands; possible international complications; past decisions approving the power of Congress to enact statutes of that type; and the Constitution's distinctions between native-born and naturalized citizens.

*Afroyim* v. *Rusk*, 387 U. S. 253 (1967). Mr. Afroyim, a Polish national by birth, immigrated to the United States at age 19 and after 14 years here acquired United States citizenship by naturalization. Twenty-four years later he went to Israel and voted in a political election there. In 1960 a passport was denied him by the State Department on the ground that he had lost his United States citizenship under the specific provisions of § 349 (a)(5) of the Act, 8 U. S. C. § 1481 (a)(5), by his foreign voting. The Court, by a five-to-four vote, held that the Fourteenth Amendment's definition of citizenship was significant; that Congress has no "general

power, express or implied, to take away an American citizen's citizenship without his assent," 387 U. S., at 257; that Congress' power is to provide a uniform rule of naturalization and, when once exercised with respect to the individual, is exhausted, citing Mr. Chief Justice Marshall's well-known but not uncontroversial dictum in *Osborn* v. *Bank of the United States,* 9 Wheat. 738, 827 (1824); and that the "undeniable purpose" of the Fourteenth Amendment was to make the recently conferred "citizenship of Negroes permanent and secure" and "to put citizenship beyond the power of any governmental unit to destroy," 387 U. S., at 263. *Perez* v. *Brownell,* 356 U. S. 44 (1958), a five-to-four holding within the decade and precisely to the opposite effect, was overruled.

The dissent (MR. JUSTICE HARLAN, joined by Justices CLARK, STEWART, and WHITE) took issue with the Court's claim of support in the legislative history, would elucidate the Marshall dictum, and observed that the adoption of the Fourteenth Amendment did not deprive Congress of the power to expatriate on permissible grounds consistent with "other relevant commands" of the Constitution. 387 U. S., at 292.

It is to be observed that both Mrs. Schneider and Mr. Afroyim had resided in this country for years. Each had acquired United States citizenship here by the naturalization process (in one case derivative and in the other direct) prescribed by the National Legislature. Each, in short, was covered explicitly by the Fourteenth Amendment's very first sentence: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This of course accounts for the Court's emphasis in *Afroyim* upon "Fourteenth Amendment citizenship." 387 U. S., at 262.

## IV

The statutes culminating in § 301 merit review:

1. The very first Congress, at its Second Session, proceeded to implement its power, under the Constitution's Article I, § 8, cl. 4, to "establish an uniform rule of Naturalization" by producing the Act of March 26, 1790, 1 Stat. 103. That statute, among other things, stated, "And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: *Provided*, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States . . . ."

2. A like provision, with only minor changes in phrasing and with the same emphasis on paternal residence, was continuously in effect through three succeeding naturalization Acts. Act of January 29, 1795, § 3, 1 Stat. 414, 415; Act of April 14, 1802, § 4, 2 Stat. 153, 155; Act of February 10, 1855, § 1, 10 Stat. 604. The only significant difference is that the 1790, 1795, and 1802 Acts read retrospectively, while the 1855 Act reads prospectively as well. See *Weedin* v. *Chin Bow*, 274 U. S. 657, 664 (1927), and *Montana* v. *Kennedy*, 366 U. S. 308, 311 (1961).

3. Section 1 of the 1855 Act, with changes unimportant here, was embodied as § 1993 of the Revised Statutes of 1878.[3]

4. The Act of March 2, 1907, § 6, 34 Stat. 1228, 1229, provided that all children born abroad who were citizens under Rev. Stat. § 1993 and who continued to reside

[3] "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

elsewhere, in order to receive governmental protection, were to record at age 18 their intention to become residents and remain citizens of the United States and were to take the oath of allegiance upon attaining their majority.[4]

5. The change in § 1993 effected by the Act of May 24, 1934, is reflected in n. 2, *supra*. This eliminated the theretofore imposed restriction to the paternal parent and prospectively granted citizenship, subject to a five-year continuous residence requirement and an oath, to the foreign-born child of either a citizen father or a citizen mother. This was the form of the statute at the time of plaintiff's birth on December 22, 1939.

6. The Nationality Act of 1940, § 201, 54 Stat. 1137, 1138–1139, contained a similar condition directed to a total of five years' residence in the United States between the ages of 13 and 21.[5]

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[4] "That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

[5] "Sec. 201. The following shall be nationals and citizens of the United States at birth:

. . . . . .

"(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided*, That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further*, That,

7. The Immigration and Nationality Act, by its § 407, 66 Stat. 281, became law in December 1952. Its § 301 (b) contains a five years' continuous residence condition (alleviated, with the 1957 amendment, see n. 1, by an allowance for absences less than 12 months in the aggregate) directed to the period between 14 and 28 years of age.

The statutory pattern, therefore, developed and expanded from (a) one, established in 1790 and enduring through the Revised Statutes and until 1934, where citizenship was specifically denied to the child born abroad of a father who never resided in the United States; to (b), in 1907, a governmental protection condition for the child born of an American citizen father and residing abroad, dependent upon a declaration of intent and the oath of allegiance at majority; to (c), in 1934, a condition, for the child born abroad of one United States citizen parent and one alien parent, of five years' continuous residence in the United States before age 18 and the oath of allegiance within six months after majority; to (d), in 1940, a condition, for that child, of five years' residence here, not necessarily continuous, between ages 13 and 21; to (e), in 1952, a condition, for that child, of five years' continuous residence here, with allowance, between ages 14 and 28.

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if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

. . . . .

"(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934."

The application of these respective statutes to a person in plaintiff Bellei's position produces the following results:

1. Not until 1934 would that person have had any conceivable claim to United States citizenship. For more than a century and a half no statute was of assistance. Maternal citizenship afforded no benefit. One may observe, too, that if Mr. Bellei had been born in 1933, instead of in 1939, he would have no claim even today. *Montana* v. *Kennedy, supra.*

2. Despite the recognition of the maternal root by the 1934 amendment, in effect at the time of plaintiff's birth, and despite the continuing liberalization of the succeeding statutes, the plaintiff still would not be entitled to full citizenship because, although his mother met the condition for her residence in the United States, the plaintiff never did fulfill the residential condition imposed for him by any of the statutes.

3. This is so even though the liberalizing 1940 and 1952 statutes, enacted after the plaintiff's birth, were applicable by their terms to one born abroad subsequent to May 24, 1934, the date of the 1934 Act, and were available to the plaintiff. See nn. 5 and 1, *supra.*

Thus, in summary, it may be said fairly that, for the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent, moved in a direction of leniency for the child. For plaintiff Bellei the statute changed from complete disqualification to citizenship upon a condition subsequent, with that condition being expanded and made less onerous, and, after his birth, with the succeeding liberalizing provisions made applicable to him in replacement of the stricter statute in effect when he was born. The plaintiff nevertheless failed to satisfy any form of the condition.

## V

It is evident that Congress felt itself possessed of the power to grant citizenship to the foreign-born and at the same time to impose qualifications and conditions for that citizenship. Of course, Congress obviously felt that way, too, about the two expatriation provisions invalidated by the decisions in *Schneider* and *Afroyim*.

We look again, then, at the Constitution and further indulge in history's assistance:

Of initial significance, because of its being the foundationstone of the Court's decisional structure in *Afroyim*, and, perhaps by a process of after-the-fact osmosis, of the earlier *Schneider* as well, is the Fourteenth Amendment's opening sentence:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The central fact, in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth-Amendment-first-sentence citizen. His posture contrasts with that of Mr. Afroyim, who was naturalized in the United States, and with that of Mrs. Schneider, whose citizenship was derivative by her presence here and by her mother's naturalization here.

The plaintiff's claim thus must center in the statutory power of Congress and in the appropriate exercise of that power within the restrictions of any pertinent constitu-

tional provisions other than the Fourteenth Amendment's first sentence.

The reach of congressional power in this area is readily apparent:

1. Over 70 years ago the Court, in an opinion by Mr. Justice Gray, reviewed and discussed early English statutes relating to rights of inheritance and of citizenship of persons born abroad of parents who were British subjects. *United States* v. *Wong Kim Ark,* 169 U. S. 649, 668–671 (1898). The Court concluded that "naturalization by descent" was not a common law concept but was dependent, instead, upon statutory enactment. The statutes examined were 25 Edw. III (1350); 29 Car. II (1677), c. 6, § 1; 7 Anne (1708), c. 5, § 3; 4 Geo. II (1731), c. 21; and 13 Geo. III (1773), c. 21. Later Mr. Chief Justice Taft, speaking for a unanimous Court, referred to this "very learned and useful opinion of Mr. Justice Gray" and observed "that birth within the limits of the jurisdiction of the Crown, and of the United States, as the successor of the Crown, fixed nationality, and that there could be no change in this rule of law except by statute . . . ." *Weedin* v. *Chin Bow, supra,* 274 U. S. 657, 660 (1927). He referred to the cited English statutes and stated, "These statutes applied to the colonies before the War of Independence."

We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the *jus soli,* that is, that the place of birth governs citizenship status except as modified by statute.

2. The Constitution as originally adopted contained no definition of United States citizenship. However, it referred to citizenship in general terms and in varying contexts: Article 1, § 2, cl. 2, qualifications for members of the House; Article 1, § 3, cl. 3, qualifications for Senators; Article II, § 1, cl 4., eligibility for the office of President;

Article III, § 2, cl. 1, citizenship as affecting judicial power of the United States. And, as has been noted, Article I, § 8, cl. 4, vested Congress with the power to "establish an uniform Rule of Naturalization." The historical reviews in the *Afroyim* opinions provide an intimation that the Constitution's lack of definitional specificity may well have been attributable in part to the desire to avoid entanglement in the then existing controversy between concepts of state and national citizenship and with the difficult question of the status of Negro slaves.

In any event, although one might have expected a definition of citizenship in constitutional terms, none was embraced in the original document or, indeed, in any of the amendments adopted prior to the War Between the States.

3. Apart from the passing reference to the "natural born Citizen" in the Constitution's Article II, § 1, cl. 4, we have, in the Civil Rights Act of April 9, 1866, 14 Stat. 27, the first statutory recognition and concomitant formal definition of the citizenship status of the native-born: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States . . . ." This, of course, found immediate expression in the Fourteenth Amendment, adopted in 1868, with expansion to "All persons born or naturalized in the United States . . . ." As has been noted above, the Amendment's "undeniable purpose" was "to make citizenship of Negroes permanent and secure" and not subject to change by mere statute. *Afroyim* v. *Rusk, supra,* 387 U. S., at 263. See Flack, Adoption of the Fourteenth Amendment 88–94 (1908).

Mr. Justice Gray has observed that the first sentence of the Fourteenth Amendment was "declaratory of existing rights, and affirmative of existing law," so far as the

qualifications of being born in the United States, being naturalized in the United States, and being subject to its jurisdiction are concerned. *United States* v. *Wong Kim Ark, supra,* 169 U. S., at 688. Then follows a most significant sentence:

> "But it [the first sentence of the Fourteenth Amendment] has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish an uniform rule of naturalization."

Thus, at long last, there emerged an express *constitutional* definition of citizenship. But it was one restricted to the combination of three factors, each and all significant: birth in the United States, naturalization in the United States, and subjection to the jurisdiction of the United States. The definition obviously did not apply to any acquisition of citizenship by being born abroad of an American parent. That type, and any other not covered by the Fourteenth Amendment, was necessarily left to proper congressional action.

4. The Court has recognized the existence of this power. It has observed, "No alien has the slightest right to naturalization unless all statutory requirements are complied with . . . ." *United States* v. *Ginsberg*, 243 U. S. 472, 475 (1917). See *United States* v. *Ness*, 245 U. S. 319 (1917); *Maney* v. *United States*, 278 U. S. 17 (1928). And the Court has specifically recognized the power of Congress not to grant a United States citizen the right to transmit citizenship by descent. As hereinabove noted, persons born abroad, even of United States citizen fathers who, however, acquired American citzienship after the effective date of the 1802 Act, were aliens. Congress responded to that situation only by enacting the 1855

statute. *Montana v. Kennedy, supra,* 366 U. S., at 311. But more than 50 years had expired during which, because of the withholding of that benefit by Congress, citizenship by such descent was not bestowed. *United States* v. *Wong Kim Ark, supra,* 169 U. S., at 673–674. Then, too, the Court has recognized that until the 1934 Act the transmission of citizenship to one born abroad was restricted to the child of a qualifying American father, and withheld completely from the child of a United States citizen mother and an alien father. *Montana* v. *Kennedy, supra.*

Further, it is conceded here both that Congress may withhold citizenship from persons like plaintiff Bellei[6] and may prescribe a period of residence in the United States as a condition *precedent* without constitutional question.[7]

Thus we have the presence of congressional power in this area, its exercise, and the Court's specific recognition of that power and of its having been properly withheld or properly used in particular situations.

## VI

This takes us, then, to the issue of the constitutionality of the exercise of that congressional power when it is used to impose the condition subsequent that confronted plaintiff Bellei. We conclude that its imposition is not unreasonable, arbitrary, or unlawful, and that it withstands the present constitutional challenge.

1. The Congress has an appropriate concern with problems attendant on dual nationality. *Savorgnan* v.

[6] At oral argument plaintiff's counsel conceded that "Congress need not vest a person in his position with citizenship if it chooses not to do so." Transcript of Oral Argument, p. 27. Counsel for the *amici* sympathetic with the plaintiff's cause made a like concession. *Id.*, p. 36.

[7] Transcript of Oral Argument, p. 26.

*United States,* 338 U. S. 491, 500 (1950); Bar-Yaacov, Dual Nationality, xi and 4 (1961). These problems are particularly acute when it is the father who is the child's alien parent and the father chooses to have his family reside in the country of his own nationality. The child is reared, at best, in an atmosphere of divided loyalty. We cannot say that a concern that the child's own primary allegiance is to the country of his birth and of his father's allegiance is either misplaced or arbitrary.

The duality also creates problems for the governments involved. MR. JUSTICE BRENNAN recognized this when, concurring in *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 187 (1963), a case concerning native-born citizens, he observed: "We have recognized the entanglements which may stem from dual allegiance . . . ." In a famous case MR. JUSTICE DOUGLAS wrote of the problem of dual citizenship. *Kawakita* v. *United States,* 343 U. S. 717, 723–736 (1952). He noted that "[o]ne who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting," p. 733; that one with dual nationality cannot turn that status "into a fair-weather citizenship," p. 736; and that "[c]ircumstances may compel one who has a dual nationality to do acts which would not be compatible with the obligation of American citizenship," p. 736. The District Court in this very case conceded:

> "It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States." 296 F. Supp., at 1252.

2. There are at least intimations in the decided cases that a dual national constitutionally may be required to make an election. In *Perkins* v. *Elg,* 307 U. S. 325, 329 (1939), the Court observed that a native-born citizen

who had acquired dual nationality during minority through his parents' foreign naturalization abroad did not lose his United States citizenship "provided that on attaining majority he elects to retain that citizenship and to return to the United States to resume its duties." In *Kawakita* v. *United States, supra,* 343 U. S., at 734, the Court noted that a dual national "under certain circumstances" can be deprived of his American citizenship through an Act of Congress. In *Mandoli* v. *Acheson,* 344 U. S. 133, 138 (1952), the Court took pains to observe that there was no statute in existence imposing an election upon that dual national litigant.

These cases do not flatly say that a duty to elect may be constitutionally imposed. They surely indicate, however, that this is possible, and in *Mandoli* the holding was based on the very absence of a statute and not on any theory of unconstitutionality. And all three of these cases concerned persons who were born here, that is, persons who possessed Fourteenth Amendment citizenship; they did not concern a person, such as plaintiff Bellei, whose claim to citizenship is wholly, and only, statutory.

3. The statutory development outlined in Part IV above, by itself and without reference to the underlying legislative history, committee reports, and other studies, reveals a careful consideration by the Congress of the problems attendant upon dual nationality of a person born abroad. This was purposeful and not accidental. It was legislation structured with care and in the light of then apparent problems.

4. The solution to the dual nationality dilemma provided by the Congress by way of required residence surely is not unreasonable. It may not be the best that could be devised, but here, too, we cannot say that it is irrational or arbitrary or unfair. Congress first has imposed a condition precedent in that the citizen parent must

have been in the United States or its possessions not less than 10 years, at least five of which are after attaining age 14. It then has imposed, as to the foreign-born child himself, the condition subsequent as to residence here. The Court already had emphasized the importance of residence in this country as the talisman of dedicated attachment, *Weedin* v. *Chin Bow*, *supra*, 274 U. S., at 666–667, and said:

> "It is not too much to say, therefore, that Congress at that time [when Rev. Stat. § 1993 was under consideration] attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent from those who had been born citizens of the colonies or of the states before the Constitution. As said by Mr. Fish, when Secretary of State, to Minister Washburn, June 28, 1873, in speaking of this very proviso, 'the heritable blood of citizenship was thus associated unmistakeably with residence within the country which was thus recognized as essential to full citizenship.' Foreign Relations of the United States, Pt. 1, 1873, p. 259." 274 U. S., at 665–666.

The same policy is reflected in the required period of residence here for aliens seeking naturalization. 8 U. S. C. § 1427 (a).

5. We feel that it does not make good constitutional sense, or comport with logic, to say, on the one hand, that Congress may impose a condition precedent, with no constitutional complication, and yet be powerless to impose precisely the same condition subsequent. Any such distinction, of course, must rest, if it has any basis at all, on the asserted "premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive," *Schneider* v. *Rusk*, *supra*, 377 U. S., at 165, and on the announce-

ment that Congress has no "power, express or implied, to take away an American citizen's citizenship without his assent," *Afroyim* v. *Rusk, supra,* 387 U. S., at 257. But, as pointed out above, these were utterances bottomed upon Fourteenth Amendment citizenship and that Amendment's direct reference to "persons born or naturalized in the United States." We do not accept the notion that those utterances are now to be judicially extended to citizenship not based upon the Fourteenth Amendment and to make citizenship an absolute. That it is not an absolute is demonstrated by the fact that even Fourteenth Amendment citizenship by naturalization, when unlawfully procured, may be set aside. *Afroyim* v. *Rusk, supra,* 387 U. S., at 267 n. 23.

6. A contrary holding would convert what is congressional generosity into something unanticipated and obviously undesired by the Congress. Our National Legislature indulged the foreign-born child with presumptive citizenship, subject to subsequent satisfaction of a reasonable residence requirement, rather than to deny him citizenship outright, as concededly it had the power to do, and relegate the child, if he desired American citizenship, to the more arduous requirements of the usual naturalization process. The plaintiff here would force the Congress to choose between unconditional conferment of United States citizenship at birth and deferment of citizenship until a condition precedent is fulfilled. We are not convinced that the Constitution requires so rigid a choice. If it does, the congressional response seems obvious.

7. Neither are we persuaded that a condition subsequent in this area impresses one with "second-class citizenship." That cliche is too handy and too easy, and, like most cliches, can be misleading. That the condition subsequent may be beneficial is apparent in the light of the conceded fact that citizenship to this plaintiff was

fully deniable. The proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place. His citizenship, while it lasts, although conditional, is not "second-class."

8. The plaintiff is not stateless. His Italian citizenship remains. He has lived practically all his life in Italy. He has never lived in this country; although he has visited here five times, the stipulated facts contain no indication that he ever will live here. He asserts no claim of ignorance or of mistake or even of hardship. He was warned several times of the provision of the statute and of his need to take up residence in the United States prior to his 23d birthday.

We hold that § 301 (b) has no constitutional infirmity in its application to plaintiff Bellei. The judgment of the District Court is reversed.

# SUPREME COURT OF THE UNITED STATES

No. 24.—October Term, 1970

William P. Rogers, Secretary of State, Appellant, *v.* Aldo Mario Bellei. } On Appeal from the United States District Court for the District of Columbia.

[April 5, 1971]

Mr. Justice Black, with whom Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

Less than four years ago this Court held that

> "the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship." *Afroyim* v. *Rusk*, 387 U. S. 253, 268 (1967).

The holding was clear. Congress could not, until today, consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up. Now this Court, by a vote of five to four through a simple change in its composition, overrules that decision.

The Court today holds that Congress can indeed rob a citizen of his citizenship just so long as five members of this Court can satisfy themselves that the congressional action was not "unreasonable, arbitrary," *ante*, at 16; "misplaced or arbitrary," *ante*, at 17; or "irrational or arbitrary or unfair," *ante*, at 18. My first comment is that not one of these "tests" appears in the Constitution. Moreover, it seems a little strange to find such "tests"

as these announced in an opinion which condemns the earlier decisions it overrules for their resort to cliches, which it describes as "too handy and too easy, and, like most cliches, can be misleading." *Ante*, at 20. That description precisely fits those words and clauses which the majority uses, but which the Constitution does not.

The Constitution, written for the ages, cannot rise and fall with this Court's passing notions of what is "fair," or "reasonable," or "arbitrary." The Fourteenth Amendment commands:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Speaking of this very language, the Court held in *Afroyim* that no American can be deprived of his citizenship without his assent. Today, the Court overrules that holding. This precious Fourteenth Amendment American citizenship should not be blown around by every passing political wind that changes the composition of this Court. I dissent.

Bellei became an American citizen under the terms of § 1993 of the Revised Statutes, as amended,[1] and he has neither renounced his American citizenship nor voluntarily assented to any governmental act terminating it. He has never given any indication of wanting to expatriate himself but, rather, has consistently maintained that he wants to keep his American citizenship. In my view, the decision in *Afroyim*, therefore, requires the Court to hold here that Bellei has been unconstitutionally deprived by § 301 (b) of the Immigration and Nationality Act of 1952[2] of his right to be an American citizen.

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[1] Section 1993 of the Revised Statutes, as amended by the Act of May 24, 1934, 48 Stat. 797.

[2] 8 U. S. C. § 1401 (b).

Since § 301 (b) does not take into account in any way whether the citizen intends or desires to relinquish his citizenship, that section is inevitably inconsistent with the constitutional principles declared in *Afroyim*.

The Court today holds that the Citizenship Clause of the Fourteenth Amendment has no application to Bellei. The Court first notes that *Afroyim* was essentially a case construing the Citizenship Clause of the Fourteenth Amendment. Since the Citizenship Clause declares that "All persons born or naturalized in the United States . . . are citizens of the United States . . . ," the Court reasons that the protections against involuntary expatriation declared in *Afroyim* do not protect *all* American citizens, but only those "born or naturalized in the United States." Afroyim, the argument runs, was naturalized in this country so he was protected by the Citizenship Clause, but Bellei, since he acquired his American citizenship at birth in Italy as a foreign-born child of an American citizen, was neither born nor naturalized in the United States and, hence, falls outside the scope of the Fourteenth Amendment guarantees declared in *Afroyim*. One could hardly call this a generous reading of the great purposes the Fourteenth Amendment was adopted to bring about.

While conceding that Bellei is an American citizen, the majority states: "He simply is not a Fourteenth-Amendment-first-sentence citizen." Therefore, the majority reasons, the congressional revocation of his citizenship is not barred by the Constitution. I cannot accept the Court's conclusion that the Fourteenth Amendment protects the citizenship of some Americans and not others.

Indeed, the concept of a hierarchy of citizenship, suggested by the majority opinion, was flatly rejected in *Schneider* v. *Rusk*, 377 U. S. 163 (1964): "We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dig-

nity and are coextensive." *Id.*, at 165. The Court there held that Congress could not deprive Mrs. Schneider of her citizenship, which she, like Mr. Bellei in the present case, acquired derivatively through her citizen mother. Consequently, the majority in its rush to overrule *Afroyim* must also, in effect, overrule *Schneider* as well.

Under the view adopted by the majority today, all children born to Americans while abroad would be excluded from the protections of the Citizenship Clause and would instead be relegated to the permanent status of second-class citizenship, subject to revocation at the will of Congress. The Court rejected such narrow, restrictive, and super-technical interpretations of the Citizenship Clause when it held in *Afroyim* that that Clause "was designed to, and does, protect every citizen of this Nation . . . ." 387 U. S., at 267–268.

*Afroyim's* broad interpretation of the scope of the Citizenship Clause finds ample support in the language and history of the Fourteenth Amendment. Bellei was not "born in the United States," but he was, constitutionally speaking, "naturalized in the United States." Although those Americans who acquire their citizenship under statutes conferring citizenship on the foreign-born children of citizens are not popularly thought of as naturalized citizens, the use of the word "naturalize" in this way has a considerable constitutional history. Congress is empowered by the Constitution to "establish an uniform Rule of Naturalization," Art. I, § 8. Anyone acquiring citizenship solely under the exercise of this power is, constitutionally speaking, a naturalized citizen. The first congressional exercise of this power, entitled "An Act to establish an uniform rule of naturalization," was passed in 1790 at the Second Session of the First Congress. It provided in part:

> "And the children of citizens of the United States, that may be born beyond the sea, or out of the

> limits of the United States, shall be considered as natural-born citizens: *Provided,* that the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." 1 Stat. 103, 104.

This provision is the earliest form of the statute under which Bellei acquired his citizenship. Its enactment as part of a "rule of naturalization" shows, I think, that the First Congress conceived of this and most likely all other purely statutory grants of citizenship as forms or varieties of naturalization. However, the clearest expression of the idea that Bellei and others similarly situated should for constitutional purposes be considered as naturalized citizens is to be found in *United States* v. *Wong Kim Ark,* 169 U. S. 649 (1898):

> "The Fourteenth Amendment of the Constitution . . . contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts." 169 U. S., at 702–703.

The Court in *Wong Kim Ark* thus stated a broad and comprehensive definition of naturalization. As shown in *Wong Kim Ark*, naturalization when used in its constitutional sense is a generic term describing and including within its meaning all those modes of acquiring American citizenship other than birth in this country. All means of obtaining American citizenship which are dependent upon a congressional enactment are forms of naturalization. This inclusive definition has been adopted in several opinions of this Court besides *United States* v. *Wong Kim Ark, supra.* Thus in *Minor* v. *Happersett*, 88 U. S. 162, 167 (1874), the Court said: "Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. . . . [N]ew citizens may be born or they may be created by naturalization." And in *Elk* v. *Wilkins*, 112 U. S. 94 (1884), the Court took the position that the Fourteenth Amendment

> "contemplates two sources of citizenship and two sources only: birth and naturalization . . . . Persons not . . . subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by force of a treaty by which foreign territory is acquired." 112 U. S., at 101–102.

Moreover, this concept of naturalization is the only one permitted by this Court's consistent adoption of the view that the Fourteenth Amendment was intended to supply a comprehensive definition of American citizenship. In an opinion written shortly after the Fourteenth Amendment was ratified, the Court stated that one of the primary purposes of the Citizenship Clause was "to establish a clear and comprehensive definition of citizenship which should declare what should

constitute citizenship of the United States, and also citizenship of a State." *Slaughter-House Cases*, 83 U. S. 36, 73 (1872). In his study, The Adoption of the Fourteenth Amendment, Professor Flack similarly concluded that the Citizenship Clause "put beyond doubt and cavil in the original law who were citizens of the United States." H. Flack, The Adoption of the Fourteenth Amendment 89 (1908). And in *Afroyim* both majority and dissenting Justices appear to have agreed on the basic proposition that the scope of the Citizenship Clause, whatever its effect, did reach *all* citizens. The opinion of the Court in *Afroyim* described the Citizenship Clause as ". . . calculated completely to control the status of citizenship." 387 U. S., at 262. And the dissenting Justices agreed with this proposition to the extent of holding that the Citizenship Clause was a "declaration of the classes of individuals to whom citizenship initially attaches." *Id.*, at 292.

The majority opinion appears at times to rely on the argument that Bellei, while he concededly might have been a naturalized citizen, was not naturalized "in the United States." This interpretation obviously imposes a limitation on the scope of the Citizenship Clause which is inconsistent with the conclusion expressed above that the Fourteenth Amendment provides a comprehensive definiton of American citizenship, for the majority's view would exclude from the protection of that Clause all those who acquired American citizenship while abroad. I cannot accept the narrow and extraordinarily technical reading of the Fourteenth Amendment employed by the Court today. If, for example, Congress should decide to vest the authority to naturalize aliens in American embassy officials abroad rather than having the ceremony performed in this country, I have no doubt that those so naturalized would be just as fully

protected by the Fourteenth Amendment as are those who go through our present naturalization procedures. Rather than the technical reading adopted by the majority, it is my view that the word "in" as it appears in the phrase "in the United States" was surely meant to be understood in two somewhat different senses: one can become a citizen of this country by being born *within* it or by being naturalized *into* it. This interpretation is supported by the legislative history of the Citizenship Clause. That clause was added in the Senate rather late in the debates on the Fourteenth Amendment, and as originally introduced its reference was to all those "born in the United States or *naturalized by the laws thereof*." Cong. Globe, 39th Cong., 1st Sess., at 2768. (Emphasis added.) The final version of the Citizenship Clause was undoubtedly intended to have this same scope. See H. Flack, The Adoption of the Fourteenth Amendment, 88–89 (1908).

The majority takes the position that Bellei, although admittedly a citizen of this country, was not entitled to the protections of the Citizenship Clause. I would not depart from the holding in *Afroyim* that every American citizen has Fourteenth Amendment citizenship. Bellei, as a naturalized American, is entitled to all the rights and privileges of American citizenship, including the right to keep his citizenship until he voluntarily renounces or relinquishes it.

The Court today puts aside the Fourteenth Amendment as a standard by which to measure congressional action with respect to citizenship, and substitutes in its place the majority's own vague notions of "fairness." The majority takes a new step with the recurring theme that the test of constitutionality is the Court's own view of what is "fair, reasonable, and right." Despite the concession that Bellei was admittedly an American citizen, and despite the holding in *Afroyim* that the Four-

teenth Amendment has put citizenship, once conferred, beyond the power of Congress to revoke, the majority today upholds the revocation of Bellei's citizenship on the ground that the congressional action was not "irrational or arbitrary or unfair." The majority applies the "shock-the-conscience" test to uphold, rather than strike, a federal statute. It is a dangerous concept of constitutional law that allows the majority to conclude that, because it cannot say the statute is "irrational or arbitrary or unfair," the statute must be constitutional.

Of course the Court's construction of the Constitution is not a "strict" one. On the contrary, it proceeds on the premise that a majority of this Court can change the Constitution day by day, month by month, and year by year, according to its shifting notions of what is fair, reasonable, and right. There was little need for the founders to draft a written constitution if this Court can say it is only binding when a majority finds it fair, reasonable, and right to make it so. That is the loosest construction that could be employed. It is true that England has moved along very well in the world without a written constitution. But with complete familiarity with the English experience, our ancestors determined to draft a written constitution which the members of this Court are sworn to obey. While I remain on the Court I shall continue to oppose the power of judges, appointed by changing administrations, to change the Constitution from time to time according to their notions of what is "fair" and "reasonable." I would decide this case not by my views of what is "arbitrary," or what is "fair," but rather by what the Constitution commands.

I dissent.

# SUPREME COURT OF THE UNITED STATES

No. 24.—October Term, 1970

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| William P. Rogers, Secretary of State, Appellant, *v.* Aldo Mario Bellei. | On Appeal from the United States District Court for the District of Columbia. |

[April 5, 1971]

Mr. Justice Brennan, with whom Mr. Justice Douglas joins, dissenting.

Since the Court this Term has already downgraded citizens receiving public welfare, *Wyman* v. *James*, 400 U. S. — (1971), and citizens having the misfortune to be illegitimate, *Labine* v. *Vincent*, — U. S. — (1971), I suppose today's decision downgrading citizens born outside the United States should have been expected. Once again, as in *James* and *Labine*, the Court's opinion makes evident that its holding is contrary to earlier decisions. Concededly petitioner was a citizen at birth not by constitutional right, but only through operation of a federal statute. In the light of the complete lack of rational basis for distinguishing among citizens whose naturalization was carried out within the physical bounds of the United States, and those, like Bellei, who may be naturalized overseas, the conclusion is compelled that the reference in the Fourteenth Amendment to persons "born or naturalized in the United States" includes those naturalized through operation of an Act of Congress, wherever they may be at the time. Congress was therefore powerless to strip Bellei of his citizenship; he could lose it only if he voluntarily renounced or relinquished it. *Afroyim* v. *Rusk*, 387 U. S. 253 (1967). I dissent.